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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 56

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

SUN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 22, 1961
CERTIORARI GRANTED FEBRUARY 19, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 629

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

SUN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BEFORE FEDERAL TRADE COMMISSION

Docket 6641.

In the Matter of SUN OIL COMPANY

SECRETARY'S CERTIFICATE

I, Robert M. Parrish, Secretary of the Federal Trade Commission and official custodian of its records, do hereby certify that transmitted herewith is a full, true and complete transcript of proceedings, had before the Federal Trade Commission in the above entitled matter, in three parts, as follows:

Part 1—Pleadings.
Part 2—Exhibits—Documentary.
Part 3—Public Docket Sheets.

and original exhibits marked:

2-1	2-2	2-4	2-5
6641-1	6641-1	6641-1	6641-1

That this transcript is certified to the United States Court of Appeals for the Fifth Circuit, pursuant to the filing in said Court of a petition for review of a final order and order to cease and desist, dated January 5, 1959, entered by the Federal Trade Commission in the above indicated proceeding.

[fol. 17] In witness whereof, I hereunto subscribe my name, and affix the seal of the said Federal Trade Commission, at its office in the City of Washington, D. C., this 30th day of March, A. D., 1959.

Robert M. Parrish, Secretary. (Seal.)

BEFORE FEDERAL TRADE COMMISSION

Docket No. 6641

In the Matter of SUN OIL COMPANY, a Corporation

COMPLAINT—September 26, 1956

The Federal Trade Commission, having reason to believe that Sun Oil Company, a corporation, has violated and is now violating the provisions of Section 2(a) of the Clayton Act (15 U.S.C. Section 13), as amended by the Robinson-Patman Act, approved June 19, 1936, and the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

[fol. 18] Count I

Paragraph One: Respondent Sun Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pennsylvania. Respondent is now, and for several years last past has been, among other things, engaged in the offering for sale, sale and distribution of gasoline in the City of Jacksonville, Florida, and adjacent territory.

Paragraph Two: Respondent sells its gasoline to a number of retailers located in the Jacksonville area and with whom respondent has entered into contracts, now in force, obligating said respondent to sell and deliver to such retailers all of their respective requirements of respondent's brand of gasoline during the term of such contracts. For the purpose of supplying said customers and of making deliveries pursuant to said contracts, respondent ships or otherwise transports its gasoline in tank cars, tankers, pipe lines and trucks from its different refineries, terminals and distribution points, located in various states of the United States to distributing points within the State of Florida and from there by tank cars or trucks to

the various retailers selling its gasoline, and there is now and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline between respondent's refineries, terminals, and distribution points and said retail dealers purchasing said gasoline in Jacksonville, Florida. All of such purchases by said retail dealers are and have been in the course of such commerce. [fol. 19] Said gasoline is transported into Florida and sold by respondent for resale in the Jacksonville area.

Paragraph Three: Since on or about December 1955, in the course and conduct of its business as above described, respondent has sold its gasoline to a dealer in the Jacksonville, Florida, market area engaged in selling said gasoline at retail at prices substantially lower than the prices charged by respondent to its other retail purchasers for gasoline of the same grade and quality in the same market area. Said dealer is one Gilbert V. McLean, who operated a gasoline station in Jacksonville, Florida, under contract with respondent, where respondent's gasoline was and is sold at retail to consumers thereof, in competition with other retailers of gasoline purchasing the same from respondent or from other manufacturers. The price at which respondent sold its gasoline to said dealer since on or about December 1955, ranged up to 1-7/10 cents per gallon lower than the prices charged by respondent to other Jacksonville retailers of the same gasoline.

Paragraph Four: The effect of the discrimination price described in the preceding paragraph hereof has been and may be to injure, destroy and prevent competition with each of the other retailers of respondent's gasoline, and others, in the resale of said gasoline at retail in the Jacksonville market area.

Paragraph Five: The acts and practices of respondent, as above alleged and described, violate sub-section (a) of Section 2 of the Clayton Act, as amended.

[fol. 20] Count II

Paragraph Six: The allegations of Paragraphs One through Four of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

Paragraph Seven: In the course and conduct of its business respondent is now, and has been at all times referred to herein, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it ships or otherwise transports its gasoline in tank cars, tankers, pipe lines, and trucks from its different refineries, terminals and distribution points, located in various stages of the United States, to retail dealers located in the Jacksonville, Florida, area and to various other states of the United States.

Paragraph Eight: Except to the extent that competition has been hindered, frustrated, and lessened as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the sale and distribution of gasoline in "commerce" as that term is defined in the Federal Trade Commission Act.

Paragraph Nine: Beginning on or about December 1955, respondent, acting through its Regional Sales Manager, one Maximilian Dietsche, and the aforementioned Gilbert V. McLean, for the purpose of suppressing, preventing, hindering and lessening price competition in com- [fol. 21] merce among the various states, entered into and have since maintained and carried out a combination, understanding and agreement through which they fixed and maintained the retail price at which gasoline was sold in the gasoline service station leased by the said Gilbert V. McLean from respondent.

Paragraph Ten: Pursuant to and in furtherance of the aforesaid unlawful combination, understanding and agreement, respondent, acting through the aforesaid Maximilian Dietsche, together with the aforesaid Gilbert V. McLean, did and performed the following acts and things:

1. Agreed to fix and maintain and did fix and maintain the retail price at which gasoline was sold at the gasoline service station operated by the said Gilbert V. McLean under lease from respondent.

2. Agreed to and adhered to certain discounts, terms and conditions upon which the said gasoline would be sold to said Gilbert V. McLean and to the purchasing public.

Paragraph Eleven: This alleged unlawful planned common course of action is singularly unfair, oppressive and

to the prejudice of the public and respondent's competitors and retailers of gasoline in the Jacksonville, Florida, market area, and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between and among respondent's retail dealers, or others, in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act, and constitutes an unfair method of competition and an unfair [fol. 22] act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 26th day of September, A.D., 1956, issues its complaint against said respondent.

Notice

Notice is hereby given you, Sun Oil Company, a corporation, respondent herein, that the 5th day of December, A.D., 1956, at 10-o'clock is hereby fixed as the time Jacksonville, Florida, as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact [fol 23] set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer, respond-

ent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 26th day of September, 1956.

By the Commission.

Robert M. Parrish, Secretary.

[fol. 24] Clerk's Note re Papers Omitted

Order Designating Hearing Examiner;
Answer of Sun Oil Company;
Letter, Henry A. Frye to John Lewis dated 10/26/58;
Order Postponing Hearing;
Order Substituting Hearing Examiner;
Order Postponing Initial Hearing;

Omitted from the printed record pursuant to designations of counsel as to printing record, copied at Pages 1 & 12.

BEFORE FEDERAL TRADE COMMISSION

MOTION TO AMEND ANSWER TO COMPLAINT — Received December 19, 1956

To the Honorable Robert L. Piper, Hearing Examiner:

Respondent respectfully moves that an order be entered amending the fourth (last) unnumbered paragraph of Paragraph Three of its Answer to read as follows:

"On the contrary, the respondent avers that the lower [fol. 25] price or prices at which it sold its gasoline to said McLean were made in good faith to enable respondent to meet its, and McLean to meet his, price competition in the competitive marketing area of the gasoline station operated by McLean, that competitive marketing area differing from the competitive marketing areas of other gasoline stations then retailing respondent's gasoline in the Jacksonville area. More particularly respondent avers that:

"Respondent was engaged in continuous and effective competition with suppliers and retailers of competing gasolines in the aforesaid competive marketing area by reason of the characteristics of supply and demand in the business of meeting the needs of motorists for gasoline, and the patterns of trade which have arisen out of those characteristics of supply and demand.

"Gasoline, being liquid and flammable, must be installed for the motorist as well as sold to him. Gasoline is produced in the form it is ultimately sold, and goes through no change in form between the refiner and the consuming motorist. The refining and distribution of gasoline require large investments in plant and equipment, and supplying gasoline to the motoring public involves large fixed costs. Most gasoline is offered for sale under a brand name, and refiners and distributors are continuously engaged in promoting acceptance of their respective brands.

"The foregoing leading characteristics of the supply are accompanied by characteristics of demand on the part of the motoring public for gasoline, of which the following are the most significant: The number of motorists regu- [fol. 26] larly seeking gasoline is very large. They buy in very small quantities for their own consumption. As

a result the marketing system has been designed to facilitate small-quantity purchases. It is impracticable for motorists to store gasoline, and therefore it is a repeat purchase item, with the result that the marketing system has been geared to meet the demand for constantly recurring purchases in the course of a broad mobility of the motorist, requiring that gasoline be available wherever this mobility takes the motorist and occasions a need for gasoline.

"Well-established buying habits of motorists serve to add additional characteristics to the demand for gasoline. Chief of these buying habits is the practice of most motorists to purchase their gasoline at one service station, selected on the basis of location, and usually within a short distance from the motorist's residence or place of work. When traveling most motorists choose a service station because of its appearance and the fact that it sells a brand that is known favorably to the motorist.

"The patterns of trade that have resulted are principally these: Oil companies continually seek the patronage of motorists by direct communication to motorists through many media, including extensive advertising of brand names and claims as to the qualities, excellence or superiorities of their gasoline. The product is marketed mainly through retail outlets that are highly specialized and located at sites proximate to concentrations of the homes and places of employment of the motorists, and along principal routes of travel. Suppliers of gasoline, and not independent station operators, maintain the bulk of all stocks [Fol. 27] required for supplying the needs of motorists, for the repeat character of the demand, and the limited space available in modern service stations for storage, prevent the station operator from stocking on the premises more than a few days' supply of gasoline.

"The prevailing patterns of trade have brought it about that the market in which competition is buying and selling gasoline takes place is a relatively small area about each station or cluster of stations in which suppliers of gasoline, through independent dealers, compete for the patronage of motorists residing or working within convenient reach of such station or stations. In this competition the independent station operator is in reality a conduit between the supplier of the branded product en-

joying consumer acceptance and the motorists, each supplier and the dealer marketing its branded gasoline constituting a channel, within which the owner of the brand fulfills the principal responsibility for promoting and guiding the competition of the channel."

December 19, 1956.

Moffett, Frye & Leopold, By Henry A. Frye, Osborne, Corp & Markham, By H. P. Osborne, Jr.

Address of Counsel:

Moffett, Frye & Leopold, 1608 Walnut Street, Philadelphia 3, Pa.
Osborne, Corp & Markham, 1625 Barnett National Bank Bldg., Jacksonville 1, Fla.

[fol. 28] Clerk's Note re Papers Omitted

Order dated 12/20/56 Granting Motion to Amend Answer;
Notice of Hearing;
Motion of Petitioner for Extension of Time to Produce Documents;
Order dated 7/3/57 Extending Time to Produce Document;
Motion of Petitioner to Incorporate Certain Documents in the Record;
Opposition of Respondent to Motion to Incorporate Certain Documents in the Record;
Motion of Respondent to Extend Time for Filing Proposed Findings of Fact, etc.;
Order dated 9/26/57 Incorporating Certain Documents in the Record and Extending the Time to File Proposed Findings of Fact;
Order dated 10/16/57 Amending Order dated 9/26/57;
Proposed Findings of Fact and Conclusion of Law by Respondent;
Reasons in Support of Respondent's Proposed Findings of Fact and Conclusions of Law;
Proposed Findings, Conclusions, Reasons Therefor, and Form of Order by Petitioner;
[fol. 29] Letter, Henry A. Frye to Robert M. Parrish,

Secretary, Federal Trade Commission dated 12/3 57, (Treated as Motion Requesting Oral Argument);

Answer of Petitioner to Motion Requesting Oral Argument;

Omitted from the printed record pursuant to designations of counsel as to printing record, copied at Pages 1 & 12.

* * * * * * *

BEFORE FEDERAL TRADE COMMISSION

ORDER CORRECTING TRANSCRIPT—December 30, 1957

Counsel supporting the complaint and counsel for respondent having stipulated on the record that certain corrections of the official transcript in this proceeding should be made.

It is Ordered that the following corrections in the official transcript should be made as provided in Section 3.16(g) of the Commission's Rules and Regulations:

Page	Line	
2	6	docket for docked
	20	as for and
5	22	should be commission's instead of er's
9	23	Peery for Perry
11	20	Pearl for Purl
19	23	Commission's for Commissioner's
23	5	First for frist
25	10	May for My

[fol. 30]

30	11	McLean for Clain
31	19	excuse for excused
32	15 & 16	Dietshe for Dietsche
	20	Beardsley for Beardley
56	17	discrepancy for descrepancy
58	16	If for It
61	16	loss for lots
64	20	hasn't for hadn't

Page	Line	
81	15	were for are
85	19	Should be 1.7
86	18	1.7c instead of .17 per cent
109	9	add "to" after "testify"
122	16	to for from
127	9	seen for saw
142	3	to for is
146	22	counsel for council
183	7	We question—
203	2	industry for district
209	17	Substitute Mr. Henderson for the witness
227	9	up for us
231	13	up for us
239	18	lesser for lessor
254	13	McClung for McClean
277	16	Should read "and if it's true"
324	6	did for that
346	13	Less for Let
360	7	insert "all" and "that"
361	10	independents for independance
362	18	1.3 cents for 1.3 percent
366	17	relief for release
371	24	cents for percent
372	24	25.9c price for 25 price
377	19	"below his 3.5 cent margin" for "below his 3.5 a half margin"
[fol. 31]		
384	10	January 7 instead of 27
387	16	He for We
466	10	insert "last" after "this," and eliminate from "is" through the end of the sentence and the word "This" in line 12.
467	26	Change "Peery" to "Peery's."
469	24	Change "there" to "then" and add "the" before "evidence."
499	11	change "recorded" to "company."
544	14	change "away" to "aware"
685	8	de minimis instead of dimininus
	21	insert "a" after "one-cent"
686	13	substitute "in" for "we are" and insert "is" after "it"

Page	Line	
728	13	insert a period after "crease." and a comma after "Stati "; capitalize "in" and change "The" to lower case.
730	10	change "indicated" to "operated"
731	11	change "out" to "our" and eliminate "it"
742	10	change "them" to "that word"
774	24	omit "that"
775	12	"precipitated" instead of as written
781	6	place a period after "fact" and capitalize "now"
	8	change "That" to "And"
	18	change "More" to lower case so as to follow "ruled" in line 17
	24	change "a" to "the"

Robert L. Piper, Hearing Examiner.

December 30, 1957.

[fol. 32] Clerk's Note re Paper Omitted

Order Closing Proceeding Before Hearing Examiner dated 4 22 58; omitted from the printed record pursuant to designations of counsel as to printing record, copied at Pages 1 & 12.

* * * * * * *

Before Federal Trade Commission

Initial Decision—April 29, 1958

Robert L. Piper, Hearing Examiner.

Rufus E. Wilson, Esq., Ross D. Young, Jr., Esq. and John B. Clayton Esq., for the Commission.

Leonard J. Emmergliek Esq., of Washington, D. C.; Moffett, Frye & Leopold, by Henry A. Frye Esq. of Philadelphia Pa.; Rawle & Henderson, by Joseph W. Henderson, Esq., of Philadelphia, Pa.; and Osborne, Copp, Markham & Earlich by Cyril C. Copp Esq., of Jacksonville, Fla., for respondent.

Statement of the Case

On September 26, 1956, the Federal Trade Commission issued its complaint against Sun Oil Company, a corporation (hereinafter called respondent), charging it with price discrimination in violation of Section 2(a) of the Clayton Act (hereinafter called the Clayton Act), 15 U.S.C. 12, et seq., as amended by the Robinson-Patman Act, and unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade [fol. 32] Commission Act (hereinafter called the Act), 15 U.S.C. 41, et seq. Copies of said complaint together with a notice of hearing were duly served on respondent.

The complaint alleges in substance that respondent discriminated in price by the sale of its gasoline to one dealer at prices substantially lower than the prices charged other dealers in the same market area, and that respondent entered into an agreement with such dealer to fix and maintain the retail price at which he sold said gasoline. Respondent appeared by counsel and filed an answer admitting the corporate, commerce, competition and certain other factual allegations of the complaint, but denying any price discrimination in violation of the Clayton Act or any price fixing agreement in violation of the Act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places from February 4, 1957, to December 30, 1957.

Both parties were represented by counsel, participated in the hearings and afforded a full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof, and pursuant to leave granted presented oral argument thereon. All such findings of fact and conclusions of law proposed by parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[1]

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[1] 5 U.S.C. 1007(b).

[fol. 34] Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a New Jersey corporation with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pennsylvania.

II. Interstate Commerce and Competition

The complaint alleged, respondent admitted, and it is found that it is now and for several years last past has been engaged in the offering for sale, sale and distribution of gasoline in commerce in various states of the United States, including the City of Jacksonville, Florida, and adjacent territories. In the course and conduct of such business, respondent ships or otherwise transports its gaoline in tank car, tankers, and trucks from its different refineries, terminals and distribution points, located in various states of the United States, to retail dealers located in the Jacksonville, Florida, area, and in various other states of the United States. All of such purchases by said retail dealers are and have been in the course of such commerce. There is now and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline between respondent's refineries, terminals, and distribution points and said retail dealers. In the course and conduct of this business, respondent is in direct [fol. 35] and substantial competition in commerce with other corporations, individuals and partnerships likewise engaged in the sale and distribution of gasoline.

III. The Unlawful Practices

The complaint contains two counts, one alleging price discrimination in violation of the Clayton Act, and the other alleging price-fixing in violation of the Act, and they are considered seriatim.

A: The Price Discrimination

The issue here framed is one of alleged secondary line price discrimination, in that it is contended that respondent sold its gasoline to a particular dealer in Jacksonville, Florida, at prices substantially lower than respondent charged its other dealers in the same market area. Respondent's answer admitted the sale at substantially lower prices to said dealer, but denied that such dealer was in the same market area as other dealers purchasing from respondent or was in competition with such other dealers, and denied that the effect of such discrimination in price may be to injure, destroy, or prevent competition with such other dealers or others, or that such discrimination was in violation of Section 2(a) of the Clayton Act.

The facts with respect to the price discrimination itself are substantially undisputed. Respondent had some 38 retail dealers in Duval County, Florida, which may for the purposes of this decision be characterized as the Jacksonville area, most of whom were in the City of Jacksonville itself. These dealers are independent contractors who enter into contracts with respondent concerning the purchase [fol. 36] of respondent's gasoline and oil, and who operate filling stations at which respondent's products are advertised and sold.

During 1955, Gilbert V. McLean as such an independent contractor operated a Sun Oil filling station located at the intersection of 19th and Pearl Streets in Jacksonville, Florida. In June of 1955, the Super Test Oil Company opened a competing station at the same intersection diagonally across from McLean's station. As established in the record, Super Test was a so-called "non-major" or "independent" brand of gasoline as compared with so-called "major" companies or "name" brands of gasoline, of which Sun Oil is one. During most of the time from June to December of 1955, the Super Test station sold its "Regular" gasoline at 26.9 cents per gallon while McLean sold his "Regular" gasoline from 28.9 cents per gallon. However, on three or four occasions between June and December of 1955, the Super Test station dropped its price substantially below 26.9, and as low as 21.9 on at least two occasions. Each time this occurred, McLean's sales of gasoline declined substantially. McLean com-

plained several times to respondent about this situation, but nothing was done until December, 1955. During that month the Super Test station reduced its prices several times on weekends, and respondent's salesman, Harry Harper, advised McLean that if it happened again respondent would try to do something.

On December 27, 1955, when McLean was still selling his gasoline for 28.9, Super Test dropped its price from 26.9 to 24.9. The same day respondent gave McLean a price allowance or discount of 1.7 cents per gallon and McLean dropped his retail price to 25.9, thereby reducing his margin of profit by 1.3 cents per gallon, the difference [fol. 37] between the discount and the 3-cent reduction in the retail price of his gasoline. Respondent did not give this discount or lower price to any of its other retail dealers in the Jacksonville area. Approximately seven such dealers were in the same sales territory as McLean. This sales territory was one of three in the Jacksonville area established by respondent, and consisted roughly of the north one-third of Duval County. About six of these dealers were relatively close to McLean's station. This discrimination in price between McLean and respondent's other dealers continued until on or about February 16, 1956, when a price war broke out in the entire area and respondent reduced its wholesale or tankwagon price to all of its dealers in the area.

As a result, McLean's sales of gasoline increased substantially. In October, 1955, he sold approximately 6500 gallons, about the same as his sales in August and September. In November, 1955, he sold 5900-odd gallons, in December, 8300-odd gallons while in January, 1956 after he reduced his price on December 27 he sold 32,100-odd gallons, almost four times as much as in December and five times as much as he averaged during August, September, October, and November. McLean's daily sales during February, 1956 until he went out of business on or about February 18, averaged approximately the same as January.

Counsel supporting the complaint called four of the Sun dealers who were in the same sales territory in Jacksonville, and the record establishes and it is found that they were in competition with McLean and adversely affected by the discriminatory price allowance granted McLean and

denied them. From December 27, 1955 to February 16, 1956 they did not receive the discount given McLean and continued to sell their gasoline for 28.9 cents per gallon [fol. 38] while McLean was selling the same product for 25.9 cents per gallon. Respondent contends that these other Sun dealers were not in the same competitive area as McLean, were not in competition with him, and therefore the granting of a lower price to McLean could not have had the effect of lessening competition or of injuring, destroying, or preventing competition with McLean. Respondent also contends that even if such dealers were in competition with McLean, counsel supporting the complaint has failed to establish that the effect of such discrimination may be to substantially lessen competition or to injure, destroy, or prevent competition with McLean, the statutory prerequisites of Section 2(a) of the Clayton Act.

With respect to respondent's first contention, the record establishes the contrary. The four dealers called as witnesses in support of the complaint were Calvin Peery, William Crabtree, Clair Winning, and Jesse McClung. Peery's station was located at the intersection of 11th and Main Streets, three blocks east and eight blocks south, and less than a mile from McLean's station. There were received in evidence as Commission's Exhibit 21-A and Respondent's Exhibit 5, maps of Duval County and Jacksonville showing the location of the various Sun stations as well as the amount of traffic flow past them. Main Street, as the name connotes, is the main thoroughfare running north and south through Jacksonville, and is also the route of U. S. 17 through Jacksonville. Pearl Street is a main artery running north and south parallel with Main Street, three blocks west of it. According to Respondent's Exhibit 5, while Main Street carries the heaviest volume of traffic, Pearl Street also carries a heavy volume of traffic, approximately one-half as much as Main Street [fol. 39] but substantially in excess of the majority of streets in Jacksonville. Much of the traffic from the north and the northwest can proceed to the downtown area alternatively by way of either Pearl or Main Streets, and in the process pass either or both McLean's and Peery's stations, as well as McClung's and Winning's stations, to be considered hereinafter.

From December 27, 1955, until the general price reduction in February, Peery, as well as the others, paid a wholesale price of 1.7 cents per gallon more than McLean. During December 1955, Peery sold 10,900-odd gallons of gasoline, which was approximately his monthly average for the last six months of 1955. In January, 1956, after the discount to, and price reduction by, McLean, Peery's gallonage dropped to 9300-odd gallons a decline in excess of 1500 gallons. In fact on only six days during January did Peery sell as much as he averaged per day during December. Perry was informed not only by Crabtree and McClung but by his own customers as well that McLean was selling Sun gasoline for three cents per gallon less. Peery complained to respondent about this and the discount to McLean but was advised that nothing could be done about it. The loss of customers, as well as the geographic proximity and pattern of traffic flow, clearly demonstrate that Peery's and McLean's stations were in competition with each other. The loss of gallonage clearly demonstrates the effect of the discriminatory allowance and reduced price.

McClung operated a Sun station at the intersection of 35th and Main Streets, east and north approximately one mile from McLean's station. There are eleven streets connecting Main Street with Pearl Street between McClung's and McLean's stations. McClung testified that most of his local [fol. 40] trade came from west of his station, which is logical because most of the area east of his station is occupied by a large cemetery. McClung also testified that most local traffic originating west of him used Pearl Street in traveling downtown, which would take them past McLean's station. McClung's credibility was seriously impaired by what proved to be an obvious alteration of his sales records, and accordingly his testimony is not credited unless it is corroborated by the testimony of other witnesses or by established facts. As previously found, the record establishes that there is a substantial flow of traffic from the north and northwest which can easily choose between Pearl and Main Streets and readily pass either or both McClung's and McLean's stations. Independently of McClung's testimony, the record establishes that McClung was aware of the discrepancy in price occurring at McLean's station, that he and Crabtree called on McLean to ascertain what was oc-

curring, and that McClung complained about the disparate treatment to respondent, which latter fact was admitted by respondent. As with the others, respondent did nothing for McClung.

In spite of the apparent alterations of McClung's sales record for the days in December after the price allowance to McLean, a careful analysis of these records reveals a substantial decline in gallonage during the first two weeks in January. McClung was in credit difficulties with respondent and as a result thereof respondent would not sell him gasoline except for cash. McClung went out of business in the latter part of January, and his operation and sales were not normal after January 14, 1956. An examination of Commission's Exhibit 22-E, McClung's sales records for December, 1955, reveals that the last three gallonage sales figures for December 29, 30, and 31 were altered by [fol. 41] reducing the amount of gallonage approximately 276 gallons for the three days. A casual examination of the figures reveals erasures and changes as well as the fact that whoever did so made the mistake of forgetting to make the appropriate changes in the monthly total and in the dollar amounts listed in the column next to the gallonage figures. The first column for December 29 shows 275 gallons with an obvious erasure of the first digit, while the second column shows corresponding receipts of $79.45, with an obvious erasure of another figure appearing underneath. This amount of money is approximately correct for the gallonage listed, but it is apparent that both figures have been altered. However, on December 30 the gallon figure is 276 with an apparent change in the first digit, whereas the amount received is $108.77 the amount which would have been received for 376 gallons, obviously indicating a change in the first digit from 3 to 2 or a total reduction of 100 gallons. The same thing occurred on December 31 : the first figure has obviously been changed from 402 to 302, whereas the dollar amount remains unchanged and is the correct amount for 402 gallons. In addition a totaling of all the gallons sold in December appearing at the foot of the column exceeds by 276 gallons the actual figures appearing in the column, but is the correct total if the changed gallonages referred to above are restored to their apparent original amounts. In spite of the foregoing discrepancies, McClung's sales records do show a substantial drop in gallonage, en

an average basis, for the first two weeks in January, 1956, compared with his monthly sales prior thereto. The record establishes and it is found that McClung's station was in the same competitive area as and in competition with McLean's station.

[fol. 42] As found above with respect to Peery and McClung, and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination. However, it must now be considered well settled that it is not necessary for the Commission to prove injury to competition on the secondary-line price discrimination case because of the meaning of the statutory language, "where the effect may be substantially lessen competition," as construed by the Supreme Court, the Courts of Appeal and the Commission. In the recent Sorensen case,[2] the Commission quoted with approval the holding of the Supreme Court in the Morton Salt case,[3] no doubt the leading case dealing with the meaning of the effect clause in a secondary-line price discrimination as follows:

"It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely effected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence." [Emphasis added.]

The dissent in Morton Salt, while preferring the language [fol. 43] "reasonable probability" to "reasonable possibility," nevertheless agreed that the facts therein fully warranted an inference of adverse effect on competition without any actual showing of injury. Recent decisions of the Courts of Appeal are to the same effect.[4]

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[2] Sorensen Mfg. Co., Inc., F.T.C. , Docket 6952 (1956).

[3] FTC v. Morton Salt Co., 334 U.S. 37 (1948).

[4] Moog Industries, Inc. v. FTC, 238 F. 2d (C.A. 8, 1956); Edelmann & Co. v. FTC, 239 F. 2d 152 (C.A. 7, 1956), cert. den.

It seems self evident that where a producer is selling a homogeneous product such as salt, automotive parts or gasoline, where competition is extremely keen among retailers, and where margins of profit or markups are small, a lower price to one of some of such competing retailers not only "may" but must have the effect of substantially lessening competition.

Crabtree operated a Sun station at 58th and Main Streets, east and north approximately two and one half miles from McLean's station. As previously found, the flow of traffic in either direction easily could alternate between Main and Pearl Streets and readily pass either or both such stations. Crabtree's gallonage fell off substantially in January after the price allowance to McLean on December 27. Crabtree sold approximately 17,000 to 18,000 gallons per month the last four months of 1955, but in January his gallonage dropped to 14,500. About January 14 Crabtree discovered that McLean was selling Sun gasoline for three cents per gallon less and visited McLean to find out why. While Crabtree was present at McLean's station, he helped McLean pump gas and waited upon, and talked to, several of his own former customers, who told him they were buying at McLean's station because of the lower price. It is difficult to conceive of more direct evidence of both competition and effect than this. Subsequently Crabtree and McClung together visited McLean and discussed the price situation with him and ascertained that he was receiving a price allowance from respondent. Crabtree, too, complained to respondent about the price discrimination but received no assistance until the general price reduction on February 16, 1956.

[fol. 44]

Winning operated a Sun station at 8028 Len Turner Road, approximately three and one half miles northwest of 19th and Pearl. Len Turner Road is a main artery from the northwest section of Jacksonville feeding directly into Pearl Street a few blocks north of McLean's station, so that most of the traffic headed for downtown which passes Winning's station would also pass McLean's. Respondent's Exhibit 5 reveals that Len Turner Road carries a high traffic flow, approximately one half as large as that carried by Main Street. Winning was advised of the lower price for Sun gasoline at McLean's station by Winning's own customers. Winning stated that a number of his customers, four of

whom he identified by name and address, told him they could purchase the same gas for three cents less at McLean's and thereafter stopped buying from him for about one month. Winning's gallonage did not drop substantially in January. However, he testified that he worked much harder and tried to improve his service in an attempt to prevent any substantial loss of business. The indirect effect upon Winning is demonstrated by the fact that in February, after he received the price discount for the first time when the general price war broke out, his gallonage jumped from 410 gallons one day to 903 the next and stayed at such levels for several months.

[fol. 45] As was pointed out by the witness Peery, the loss of customers to McLean also had an effect upon the sale of other items such as oil, tires, batteries, and accessories. While respondent contends that the price differential at McLean's station could have no effect upon its other dealers because they were not in the same competitive area, which respondent would limit to a very small area adjacent to and in the immediate vicinity of 19th and Pearl Streets, in addition to the facts found, hereinbefore, one of respondent's principal witnesses, its vice-president, Willard Wright, in testifying before a Senate Small Business Subcommittee in 1955 on behalf of respondent had this to say:

"Keen competition always has existed in the marketing of gasoline in most parts of the country. Motorists are particularly price conscious when they buy gasoline. Americans of all income brackets own and operate automobiles. For those in the lower brackets gasoline is an important item in their family budgets and they seek opportunities to reduce the cost of that item.

"Moreover, unlike consumers of most commodities, motorists are mobile. They can without trouble drive several blocks down the street to another service station, if the first fails to please them. Indeed motorists will go out of their way a mile or two to save two or three cents on a gallon of gasoline. Out on the open highways, motorists sometimes drive past 10 to 20 stations before they stop at one whose appearance and posted prices suit them.

[fol. 46] "Naturally the sellers of gasoline responded to these characteristics of their customers. Alert service station operators keep a sharp eye on the prices of their com-

petitors and price changes, particularly on the downside, are quickly followed. Delay in doing so inevitably would mean a loss of business. Volume is important to the dealer because many of his operating costs are more or less fixed, irrespective of the number of gallons of gasoline he sells. Any substantial drop in volume means an increased unit cost of doing business."[5]

The fact that the effect of respondent's price discrimination "may be to substantially lessen competition" was fully elucidated in a recent Federal Court decision, the Enterprise case,[6] where Judge Smith said, with respect to facts substantially similar to those herein: "The effects on gallonage of price differentials in the same brand and grade of gas within an area no larger than the Greater Hartford area must be found to be substantial."

In addition to its foregoing contentions, respondent also urges that its lower price was given to McLean in good faith to enable respondent to meet competition, as provided in Section 2(b) of the Clayton Act. For several reasons this contention is without merit. First and most importantly, as found by the Court in the Enterprise case, supra, and as clearly evidenced by the decision of the Supreme Court in the Standard Oil case,[7] the proviso in 2(b) has reference to the good faith meeting of competition of the seller, and not the competition of the buyer, as in this case. [fol. 171] Exactly the same contention was made and disposed of in the Enterprise case, where the Court said:

"Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made available to those other stations by a competing oil company . . . That is the competitive level at which the justification is provided for defendant in the Act, however. The Act does not go so far as to allow discriminatory price cutting to enable a buyer to meet prices competition, but only to enable the seller to meet a lawful price of the seller's competitors."

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[5] Commission's Exhibit 14 C.

[6] Enterprise Industries, Inc. v. The Texas Company, 136 F. Supp. 420 (U.S.D.C., Conn. 1955).

[7] Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

The decision of the Supreme Court in the Standard Oil case, supra, clearly establishes that the price which a seller may in good faith meet is that offered to a customer of the seller by the seller's competitor.

It is true, of course, as respondent argues, that where one or some of its dealers are faced with ruinous price competition respondent must take some action or suffer the loss of such dealership and respondent's sales thereto. Respondent would equate its dealers' competition with its own competition, but of course this is not the law and cannot justify price discriminations injuring others. Respondent could, if it chose to, meet such competition at the dealer level by nondiscriminatory reductions in price to all dealers, or by operating its own stations and thus being in direct competition with other stations which reduce prices. Respondent's argument is essentially one of difficulties and problems claimed to have been brought about by the statute, which is not for the Commission to pass upon and more properly should be directed to Congress.

The second reason negating respondent's attempted reliance upon Section 2(b) is that the lower price at which [fol. 48] respondent sold its gasoline to McLean was not made in good faith to enable McLean to meet his price competition. With regard to this, there is considerable evidence in the record concerning a contention by counsel supporting the complaint that the usual and customary price differential between so-called regular major gasoline and regular non-major gasoline is two cents a gallon. There is also considerable evidence in the record that the price differential between the two is frequently one cent a gallon. Suffice it to say that there is not sufficient reliable, probative and substantial evidence in the record to establish what, if any specie amount, is the usual and customary differential between major and nonmajor regular brands of gasoline. However, the record does establish that the usual differential between McLean's station and the Super Test station across the street was two cents a gallon. McLean unequivocably testified that such a differential did not harm him competitively, but that when the differential was greater it caused him substantial injury. The record establishes that respondent gave McLean a 1.7 cent price allowance in order to enable him to post a price of 25.9, or one cent above the price to which Super Test had cut its

gasoline. In the light of McLean's undisputed testimony, it is apparent that this was more than a good faith meeting of competition; even assuming arguendo such defense to be applicable, but was in effect a beating of competition which, of course, is not permitted by Section 2(b) of the Clayton Act. The proviso is after all a proviso and can only justify price discriminations when made in good faith to meet competition, and as such obviously cannot justify price dis- [fol. 49] criminations in excess of those necessary to meet competition.[7]

The third reason the 2(b) defense is not applicable here is that the lower price at which respondent sold its gasoline to McLean was not made in good faith to enable McLean to meet his price competition. As is found hereinafter in Section III-B, in connection with the granting by respondent of the discount to McLean, respondent and McLean entered into an agreement fixing the retail price at which McLean would resell the gasoline. Section 2(b) provides a defense to a seller if his lower price is made in "good faith" to meet an equally low price of a competitor. Numerous decisions have emphasized the fact that such a lower price must have been made in good faith and have even held in this regard that the price met must be a lawful one. It is apparent that a lower price granted as consideration for an illegal agreement to fix prices could under no circumstances be considered as one made in good faith.

A preponderance of the reliable probative and substantial evidence in the entire record convinces the undersigned, and it is found, that respondent by engaging in the above found acts and practices has discriminated in price between different purchasers of commodities of like grade and quality, and that the effect thereof has been, is, and may be substantially to lessen competition and to injure, [fol. 50] destroy, and prevent competition with other retailers of respondent's gasoline, in violation of Section 2 (a) of the Clayton Act. It is further concluded and found

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[7] Porto Ricans Tobacco Co. v. American Tobacco Co., 30 F. 2d 234 (C.A. 2, 1929); Moss, Inc. v. FTC, 148 F. 2d 378 (C.A. 2, 1945), Anheuser Busch, Inc. F.T.C. , Docket No. 6331 (1957); Cf. Standard Oil Co. v. FTC, 340 U.S. 231 (1951).

that such price discrimination was not made in good faith to meet an equally low price of a competitor.

B. The Price-Fixing Agreement

As previously noted, Count II of the complaint alleged that respondent and McLean entered into a combination, understanding and agreement through which they fixed and maintained the retail price at which McLean sold his gasoline. It is undisputed in the record that McLean was an independent contractor with sole and exclusive authority to fix the retail price at which he sold his gasoline. The same incident on December 27, 1955, when respondent granted a discount to McLean, is also alleged as the price-fixing arrangement between respondent and McLean. As previously found, from August to December of 1955, McLean complained several times to respondent about the price cutting by the Super Test station across the street. Until December 27, each time McLean complained to respondent's agents, he was advised that there was nothing they could do about it. Respondent employs salesmen who, among other things, call upon the filling station operators in their territory. Prior to December 27, McLean had been contacted by salesman Elbey and Harper and also by Edward Beardsley, respondent's district manager.

The testimony of respondent's witnesses reveals that respondent had the situation at 19th and Pearl Streets under careful consideration for some time. McLean had made it clear that unless something was done to meet the [fol. 51] Super Test competition he would be forced out of business. Beardsley advised Maximilian Dietshe, respondent's regional manager, of the situation, and Dietshe in turn advised Willard Wright, respondent's vice-president at its home office in Philadelphia. After consideration of the situation and examination of the facts, they were all in agreement that something would have to be done to help McLean. McLean testified that on December 27 Harper contacted him and advised him that if Super Test dropped its price again respondent would try to do something. Later the same day after Super Test dropped its price, Harper returned and advised McLean that he would be given a price adjustment of 1.7 cents if he would absorb 1.3 cents himself and drop his retail price to 25.9. As previously

found, McLean had been selling his gasoline at 28.9. His gross margin of profit or difference between wholesale and retail price had been 4.8 cents per gallon. As a result of dropping his price to 25.9 and absorbing 1.3 of this reduction, his gross margin of profit was reduced to 3.5 cents per gallon.

The key issue is, of course, just what arrangement or understanding was reached between respondent and McLean on December 27. Respondent contends, and its officials so testified, that there was no agreement with McLean concerning his retail price and that he voluntarily and unilaterally elected to post a price of 25.9 cents and take a cut in profit of 1.3 cents. McLean, too, testified that there was no "agreement" between him and respondent to fix his retail price, but his testimony concerning what was actually said and done on December 27 reveals quite clearly that there was an agreement entered into between respondent and McLean fixing the price at which he would sell his gasoline in consideration of being granted a price allowance or discount by respondent.

[fol. 52] McLean testified that he was required to take a 1.3 cent cut in profits in order to get the adjustment. Again, after testifying that there was no "agreement" to fix his retail prices at 25.9 cents per gallon, McLean testified as follows:

"Q. So that was a reduction of three cents a gallon?

"A. Yes, sir.

"Q. Did Mr. Harper or any representative of the Sun Oil Company say to you that they would attempt to keep this differential of three cents?

"A. No, sir, not that I remember.

"Q. But on that particular time, did he say that to you?

"A. It was made that I wanted and they stated that I drop my gas to that price according to Super Test across the street, but as far as dropping it any lower or raising it—" (Emphasis added.)

It is clear from the testimony of McLean that he was required by respondent to take a cut in profits of 1.3 cents per gallon, i.e., to post a price of 25.9 cents per gallon, in order to secure the price discount of 1.7 cents per gallon from respondent. Harper, respondent's agent who made

this arrangement with McLean, was not called as a witness, and accordingly McLean's testimony stands undisputed.

In addition to McLean's direct testimony concerning the arrangement, the factual circumstances surrounding it also lead inevitably to the conclusion that McLean did not voluntarily and unilaterally post the price of 25.9 cents, but did so as the result of an agreement with respondent in order to obtain the price assistance. It has previously been found, as McLean himself testified, that he was not hurt competitively as long as the price difference between [fol. 53] his station and the Super Test station did not exceed two cents a gallon. In addition to his testimony to that effect, undisputed statistical facts in the record clearly reveal that McLean was not hurt competitively when the difference between his price and Super Test's was two cents per gallon. This is dramatically illustrated by what happened after December 27.

When McLean cut his price to 25.9 cents on December 27, Super Test was selling its gasoline at 27.9. On January 3, 1956, approximately one week later, Super Test dropped its price to 25.9, and thereafter for substantially the entire month of January a two cent differential existed between McLean's and Super Test's price. Nevertheless, although the record reveals that Super Test's gallonage at 19th and Pearl had been averaging between 10,000 and 11,000 gallons per month up to December and was approximately 19,000 gallons in December, during which month Super Test cut its price several times, in January, 1956, Super Test's gallonage jumped to 61,000 plus gallons and McLean's gallonage jumped approximately four or five times in excess of the preceding months. These facts make it abundantly clear that it was not necessary for McLean to reduce his price to within one cent of Super Test in order to be competitive, inasmuch as after a price reduction his gallonage increased tremendously during a month when for all but two days the difference in price between McLean and Super Test was two cents per gallon. If McLean had not been required to reduce his price to 25.9 in order to receive the 1.7 cent allowance from respondent, he could have reduced his price to 26.9, within two cents of Super Test's price, not have been hurt competitively, and yet retained a margin of four and one half cents per [fol. 54] gallon, thereby reducing his gross profit only 3

cents per gallon. If he had done this, it is clear from the record that his competitive situation would not have been injured and he would have maintained a much more adequate margin of profit.

McLean told Crabtree and McClung when they contacted him concerning his lower prices that he was very dissatisfied with the arrangement because while he was selling a lot of gasoline he was doing a lot of work and not making much profit. This is corroborated by the fact that although McLean substantially increased his gallonage in January and February, on or about February 18 he gave up and went out of business. It is apparent that if McLean had retained unilateral control of his retail price, he could have reduced his price to within two cents of Super Test, retained substantially all of his margin of profit, and substantially increased his gallonage because that is exactly what happened during January with a reduced price and a two-cent differential between the stations.

It is well settled, and requires no extended discussion, that price fixing, no matter in what manner, shape, or form, and regardless of the motivation, is illegal per se.[9] The following comments of the Supreme Court in the Socony-Vacuum case[10] seem appropriate here:

[fol. 55] * * * But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

"Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform

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[9] Ethel Gas Corporation v. U.S., 309 U.S. 436 (1940); U.S. v. Socony-Vacuum Oil Company, 310 U.S. 150 (1940); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951); and Virginia Excelsior Mills, Inc., F.T.C. , Docket No. 6630, October 25, 1957.

[10] Footnote 9, supra.

and inflexible. Price fixing as used in the Trenton Potteries case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price fixing was used. * * * Hence prices are fixed within the meaning of the Trenton Potteries case if the range within which purchases or sales will be made is agreed upon; if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial."

While it has been found above that there is direct evidence of the price-fixing agreement, it is settled law that such an agreement also may be proven by circum- [fol. 56] stantial evidence,[11] as also found above. It further has been held by the Supreme Court that business behavior is admissible circumstantial evidence from which the fact finder may infer agreement.[12]

In addition to denying that it had engaged in price fixing, respondent contends that even if it had it was not in violation of the Act because of the amendment of Section 5 by the McGuire Act authorizing pursuant to State laws fair trade agreements prescribing minimum or stipulated prices for the resale of branded products. The short answer to this contention is that the Florida Fair Trade Act was held unconstitutional as to nonsigners by the

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[11] United States Maltsters Ass'n. v. FTC, 152 F.2d 162 (C.A. 7, 1945); Milk & Ice Cream Can Institute v. FTC, 152 F.2d 478 (C.A. 7, 1946); Fort Howard Paper Co. v. FTC, 156 F.2d 899 (C.A. 7, 1946); Allied Paper Mills v. FTC, 168 F.2d 600 (C.A. 7, 1948); Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (C.A. 7, 1948) aff'd, 336 U.S. 956; and National Lead Co. v. FTC, 227 F.2d 823 (C.A. 7, 1955).

[12] Interstate Circuit, Inc. v. U.S., 306 U.S. 208 (1939); and Theatre Enterprises, Inc. v. Paramount, 346 U.S. 537 (1954).

Supreme Court of Florida.[13] This decision, as well as numerous others, makes it clear that the McGuire Act amendment refers only to written agreements or contracts for fair trade prices, and, of course, there was no written agreement here. In addition, the Supreme Court in the McKesson Robbins case[14] held that a corporation which both manufactures and wholesales a product cannot, under the Miller-Tydings or the McGuire Acts, enter into fair trade agreements with wholesalers because in effect such agree- [fol. 57] ments would be between competitors and hence in violation of Section 5(a)(5) of the Act. Respondent itself operates certain filling stations known as company stations, and accordingly if there were any fair trade agreement, it would be in violation of Section 5(a)(5) of the Act and no defense to a price fixing agreement.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent and McLean entered into, maintained and carried out a planned common course of action, agreement, combination, or understanding to fix and maintain the retail price at which McLean was to sell gasoline, all to the prejudice and injury of the public, respondent's competitors, and McLean's competitors, which constitute an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Act.

Conclusions of Law

1. Respondent is engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and the Clayton Act.

2. The effect of the acts and practices of respondent hereinabove found in Section III-A may be and has been to substantially lessen competition, and to injure, destroy, and prevent competition with the recipient of respondent's

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[13] Miles Laboratories, Inc. v. Eckerd, 73 So. 2d 680 (Fla. Sup. Ct. 1954).

[14] U.S. v. McKesson Robbins, Inc., 351 U.S. 305 (1955).

discrimination, such acts and practices constituting a violation of Section 2(a) of the Clayton Act.

[fol. 58] The acts and practices of respondent hereinabove found in Section III-B are all to the prejudice and injury of the public and competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

4. As a result thereof, substantial injury has been done to competition in commerce.

5. This proceeding is in the public interest, and an order to cease and desist the above-found acts and practices should issue against respondent.

Order

It Is Ordered that respondent Sun Oil Company, a corporation, its officers, directors, agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its products in commerce, as "commerce" is defined in the Act and the Clayton Act, do forthwith cease and desist from:

A. Discriminating in price by selling such products of like grade and quality to any purchaser at net prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of respondent's products;

B. Entering into, continuing, cooperating in, or carrying out, or attempting so to do, any planned common course of action, understanding, agreement, combination, or conspiracy with any person or persons not parties hereto, to [fol. 59] attempt to, or to establish, fix, adopt, maintain, or adhere to, by any means or method, prices at which said product is to be resold;

C. Granting any discounts, rebates, price reductions or other form of consideration for the purpose, or with the effect, of fixing or maintaining the prices at which said product is to be resold.

Provided, However, that nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Act as amended by the

McGuire Act (Public Law 542, chapter 745, 82nd Cong., 2d Session, approved July 14, 1952).

Robert L. Piper, Hearing Examiner.

April 29, 1958.

CLERK'S NOTE RE PAPERS OMITTED

Notice of Intention to Appeal;

On Appeal from Initial Decision—Motion for Extension of Time;

Order dated 6 16 58 Extending Time for Filing of Appeal Brief;

Brief of Respondent;

Request for Oral Argument by Respondent;

[fol. 60] Notice of Oral Argument;

Motion of Petitioner for Extension of Time to File Reply Brief;

Order Extending Time to File Brief dated 8 7 58;

Brief of Counsel Supporting the Complaint in Opposition to Appeal Brief of Respondent;

Notice;

On Appeal from Initial Decision—Motion of Respondent for Extension of Date for Oral Argument;

Notice;

Omitted from the printed record pursuant to designations of counsel as to printing record, copied at Pages 1 & 12.

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[fol. 61] BEFORE FEDERAL TRADE COMMISSION

Docket No. 6641

Commissioners: John W. Gwynne, Chairman; Robert T. Secrest, Sigurd Anderson, William C. Kern, Edward T. Tait.

In Matter of SUN OIL COMPANY, a Corporation

FINAL ORDER—Issued January 5, 1959

This matter having been heard by the Commission upon the appeal of the respondent from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal and oral argument of counsel; and

The Commission having rendered its decision denying the appeal and adopting the findings, conclusions and order contained in the initial decision:

It Is Ordered that respondent Sun Oil Company shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the aforesaid initial decision.

By the Commission.

Robert M. Parrish, Secretary. (Seal.)

J. W. G., R. P. S., W. C. K., E. T., S. A.

[fol. 62] BEFORE FEDERAL TRADE COMMISSION

OPINION OF THE COMMISSION—January 5, 1959

By GWYNNE, Chairman:

In Count I, complaint charges respondent with a violation of Section 2(a) of the amended Clayton Act in the sale of gasoline to one customer at prices substantially lower than prices charged competing customers, with resulting injury. In Count II, respondent is charged with a

violation of Section 5 of the Federal Trade Commission Act by conspiring with such favored customer to fix and maintain the retail price at which such customer sold gasoline at his filling station. The hearing examiner found against respondent on both counts and entered his order accordingly. Respondent has appealed.

Count I

Respondent is engaged, among other things, in the sale and delivery by tank wagon of gasoline to independent filling station operators. The alleged favored customer and co-conspirator, Gilbert B. McLean, during 1955 and part of 1956, operated a filling station under contract with respondent at the intersection of 19th and Pearl Streets, Jacksonville, Florida. In June, 1955, the Super-Test Oil Company, selling a non-major or private brand of gasoline (as distinguished from the gasoline sold by McLean under the brand of a major supplier), opened a new service station across the street from that operated by McLean. From its opening until December, 1955, the price usually posted by Super-Test for its regular gasoline was 26.9¢ per gallon, although on occasion its price was lower and even as low as 21.9¢ per gallon.

[fol. 63] The competition of this new station in selling its gasoline at substantially reduced prices caused injury to McLean who was selling at 28.9¢ per gallon, and he appealed to respondent for help. On December 27, 1955, Super-Test dropped its price to 24.9¢ per gallon. Respondent then agreed to give McLean a discount of 1.7¢ per gallon on tank wagon price and McLean dropped his price to 25.3¢. Respondent did not give a similar allowance to any other retail dealer in the Jacksonville area. This difference in price continued until February 16, 1956, when a major price war involving various other companies broke out in Jacksonville and all dealers of respondent were given a price which was the same for all.

Respondent first challenges the sufficiency of the evidence to support the findings of the hearing examiner as to Count I in the following particulars:

1. That the respondent discriminated in price between customers who were competitors within the meaning of the statute.

2. That the difference in price was of such a character as to create a probability of substantially lessening competition.

Considerable evidence was introduced on these propositions. It is reviewed at some length in the initial decision and will not be repeated here. Generally, it consists of:

1. Figures showing increase or decrease in the gallonage of certain affected stations.

[fol. 64] 2. Evidence as to the loss of specific customers.

3. Geographic details as to location of stations and streets and highways and other facts which might influence buying habits of customers.

On the subject of gallonage, the hearing examiner found that McLean's sales of gasoline were as follows:

August, September and October, 1955—6,500 gallons per month.

November, 1955—5,900 gallons per month.

December, 1955—8,300 gallons per month.

January, 1956—32,100 gallons per month.

Daily sales until February, 1956, when McLean quit business, averaged approximately the same as January.

The sales of Calvin Peery, who sold respondent's gasoline at 28.9c, and whose station was less than a mile from McLean's, were as follows:

December, 1955—10,900 gallons per month (which was approximately his monthly average for the last six months of 1955).

January, 1956—9,300 gallons per month.

Jesse McClung, also selling respondent's gasoline at 28.9c and whose station was about a mile distant from McLean's, [fol. 65] also, according to the hearing examiner, sold a substantially lesser amount of gasoline on an average basis for the first two weeks of January, 1956 than he did in the previous month.

William Crabtree's Sun Station, about 2½ miles from McLean's, sold about 17,000 to 18,000 gallons per month during the last four months of 1955 and 14,500 in January, 1956.

Clair Winning, operating a Sun station about 3 miles from McLean's, did not lose gallonage in January. After

February 16, 1956, when he received the general price reduction previously referred to, his gallonage increased from 410 gallons on one day to 903.

As against these figures, respondent introduced figures from the Florida Tax reports indicating a decrease in total gasoline sales in Duval County (roughly the same as Jacksonville) from December, 1955, to January, 1956, of 6%. Respondent's appeal also calls attention to other evidence. For Example, McClung's faulty records (for which the hearing examiner made due allowance in evaluating his testimony); the fact that Perry did not keep his station open on Sundays in January, 1956 (a fact also true of December, 1955); Crabtree's working at the Post Office (although his station was operating as usual).

These circumstances have all been considered but we believe they do not explain the changes in gallonage figures as previously pointed out.

Secondly, all the station operators above named were called as witnesses and gave instance of loss of specific [fol. 66] customers. For example, Crabtree saw some of his former customers buying gas at McLean's station and heard from them that it was because of the cheaper price. Winning identified four customers by name and address who abandoned him because of the cheaper price at McLean's. Furthermore, some of these station operators testified that they complained to respondent that they were losing business because of this discriminatory pricing and asked for a reduction in price similar to that given McLean.

The situation disclosed by the record is similar to that considered by the Commission and the Courts on several occasions. See, for example, Federal Trade Commission v. Morton Salt Company (1948) 334 U.S. 37; In the Matter of Sorenson Manufacturing Company (1956), Docket No. 6052.

Here, we have a number of small independent retailers selling an identical product at the same price and under substantially the same conditions. All were operating at a small margin of profit and in an area which was a reservoir of potential customers who, because of the geographic situation, had easy access to that dealer who offered an advantage in price or in services rendered. When such a situation is shown to exist, together with proof that one competitor received a discount from a common supplier,

an inference of injury to the others may reasonably be drawn from that fact. Even where other evidence showing injury is presented, this inference may be considered in addition to other proof. The question involved has to do with the inference which may properly be drawn from admitted or proven facts and not with the burden of proof. Although Samuel H. Moss, Inc. v. Federal Trade Commission (1945), 148 F. 2d 378, is often cited to the contrary, the weight of authority is to the effect that counsel [fol. 67] supporting the complaint has the burden of proof to establish the necessary injury. See In the Matter of General Foods Corporation (1954); 50 Federal Trade Commission Decisions 885."

In spite of certain statements made in the initial decision, the hearing examiner stated: "As found above with respect to Peery and McClung and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination."

We agree with this finding.

The respondent next argues that the hearing examiner erred in failing to find that the respondent had established in fact and as a matter of law the defense of good faith meeting of competition within the proviso of Section 2(b) of the amended Clayton Act, which provides:

"Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition.

[fol. 68] As pointed out by the hearing examiner, this argument goes beyond the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer. This con-

struction of the proviso was upheld in Enterprise Industries, Inc. v. The Texas Company (1955), 136 Fed. Supp. 420 (reversed on another ground).

Count II

Prior to December 27, 1955, when Super Test cut its price, McLean did not make any reduction. However, on several occasions, he talked to representatives of respondent and was advised they could do nothing about it. It does appear, however, that its officials were giving consideration to the matter. On December 27, 1955, Super Test dropped its price to 24.9c. On that same day, Harry Harper, a salesman for respondent, called at the McLean station and advised McLean that he would get a reduction of 1.7c per gallon.

Direct evidence as to what was said on this occasion is found in the testimony of McLean. There is some conflict in this testimony. The hearing examiner concluded that Harper advised McLean "that he would be given a price adjustment of 1.7c per gallon if he would absorb 1.5c himself and drop his retail price to 25.9c."

The hearing examiner had the opportunity to observe the witnesses as they testified. His conclusions as to the weight to be given their various statements should be given proper consideration by the Commission. Universal Camera Corporation v. National Labor Relations Board, 340 U.S. 474; Folds v. Federal Trade Commission (1951) 187 F. 2d 658.

[fol. 69] There are other facts in the record that support the hearing examiner's conclusion. For example, it appears that in order to compete with Super Test, McLean needed only a 2c margin which, of course, would have given him a larger margin of profit. Crabtree and Mc'lung both testified that McLean indicated dissatisfaction with the arrangement with respondent and that McLean told them that he was selling a lot of gas, doing a lot of work, but not making much profit. On or about February 18, 1956, McLean went out of business.

These facts lend support to the view that in posting his price, McLean was complying with an agreement, rather than acting as a free agent.

Secondly, Harry Harper was not called as a witness

nor was any reason given for failure to do so. That this is a circumstance to be considered is well settled. Runkle v. Burnham (1894) 153 U.S. 216; Local 167 International Brotherhood of Teamsters v. United States (1934) 291 U.S. 293.

Robert H. Gravette, Jr., an examiner for the Federal Trade Commission, testified as to a conversation he had with McLean in which the latter told of a telephone conversation on December 27, 1955, with someone representing respondent, who said: "If you lower the price of gasoline in your station by 3c, we will give you a promotional allowance of 1.7c per gallon"; that McLean reported he agreed and reduced his price accordingly.

It is not disputed that respondent knew of McLean's competitive problem and did give him a 1.7c reduction and that McLean thereafter reduced his price. The question to be determined is whether that reduction, (either expressly or by implication) was conditioned on the posting of a certain price by McLean.

[fol. 70] It is well known that conspiracies are often not capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances. Bansel Machine Tool Company v. Aluminum Company. (1934) 72 F. 2d 236, 15 C.J.S. 1043, et seq.

The situation here is somewhat similar to that in Eastern States Lumber Association v. United States (1914) 234 U.S. 600, involving a conspiracy to violate the Sherman Act. There it was shown that members of a retail lumber dealers association collected information about wholesalers who also sold direct to consumers, a practice in disfavor with retail dealers. The names of such wholesalers were made available to all members of the Association. There was no direct proof of any agreement among retailers to refrain from dealing with these wholesalers. The Court held that, nevertheless, such agreement would be inferred. Here, there is direct testimony as to the agreement. The conclusion that it amounted to a price-fixing agreement is substantially supported by the circumstances as shown in the record.

Respondent also contends that even if an agreement were made as to price, it was, nevertheless, legal under the McGuire Act which permits agreements between a

seller and a buyer prescribing minimum or stipulated resale prices under certain conditions, when such agreements are lawful under any statute, law or policy in effect in the jurisdiction in which such resale is to be made.

In Liquor Store v. Continental Distilling Corporation (Fla. 1949), 40 So. 2d 37, the Supreme Court of Florida declined to enforce the resale agreement on the ground that it was arbitrary and unreasonable and contrary to the public policy announced by the Florida Constitution [fol. 71] and statutes. In Miles Laboratories, Inc. v. Eckerd (1954), 73 So. 2d 680, after the adoption of the McGuire Act, the Court arrived at the same conclusion. Although both of these cases had to do with "non-signers", the decisions were not put on that ground. (For comment on these decisions, see note in 19 ALR 2d 1139, and Shakespeare Company v. Lippman's Tool Shop Sporting Goods Company (Mich. 1952), 54 N.W. 2d 268.) In Sunbeam Corporation v. Masters of Miami (1956), 235 F. 2d 191, the Federal Circuit Court of Appeals for the Fifth Circuit, in commenting on the "strong and consistent declarations of the Florida Supreme Court to the effect that the public policy of Florida is opposed to price maintenance" had this to say:

"We think it may well be that Fair Trade contracts are unenforceable in Florida even between the parties; however, it would seem that this is unnecessary in our decision here and we do not decide that question."

That case also involved non-signers.

The McGuire Act covers agreements "prescribing minimum or stipulated prices". In this respect, it differs from the Miller Tydings Act which has to do only with minimum prices for resale. Each statute immunizes certain agreements from attack under the Sherman Act but only to the extent that such agreements are lawful in the jurisdiction where the resale is to take place.

The Florida Fair Trade statute provides that a contract relating to the sale or resale of a commodity may lawfully contain a provision "that the buyer will not resell such commodity at less than the minimum price stipulated by the seller". Thus, the authority granted in regard to resale contracts is more limited than that contained in the McGuire Act.

[fol. 72] Prior to the adoption of the Florida Fair Trade statute, price fixing was illegal in Florida and the contract under consideration here would clearly have been contrary to law. Even though the statute be considered to be Constitutional and enforceable as to parties to the agreement, it affords exemption from the general laws against price fixing only to the extent provided in the Act, that is, as to the establishment of a minimum price for resale. It does not give a buyer and a seller a free hand to make what contract they wish as to agreed price and thus virtually repeal the general policy of Florida against price fixing.

The agreement between respondent and McLean was not for the purpose of establishing a minimum resale price. On the contrary, it was a contract under which the parties jointly agreed to share the loss of profits incident to selling gasoline at a lower price. It was obviously not made with the Florida Fair Trade Act in mind. Nor can it derive any protection from it. Consequently, the condition laid down in the McGuire Act which is necessary for immunity from Sherman Act attack has not been met and the Act is not available to respondent.

United States v. Socony Mobile Oil Company (1957) 157 F. Supp. 202, cited by respondent, is not in conflict with the conclusion herein. In that case, the Court pointed out that under Massachusetts law, a wholesaler or distributor has an absolute right to designate the terms of resale and that a producer of a trade-marked article, which is of a class in open competition, may fix the price at which the retailer may sell. Consequently, the condition necessary for the McGuire Act to become effective is found to exist. In Florida, the opposite is true.

[fol. 73] The hearing examiner also found that respondent operates some "company" filling stations in competition with its retailers and that, under United States v. McKesson and Robbins Company, Inc. (1955) 351 U. S. 305, the agreement between respondent and McLean would not be within the protected area afforded by the McGuire Act.

We agree with the conclusion of the hearing examiner that the defenses based on the Florida Fair Trade Act or the McGuire Act have not been established.

Finally, respondent claims that "the examiner's cease and desist order is unwarrantedly broad and punitive."

Similar objections have been made many times and rejected by the Courts. In Maryland Baking Company v. Federal Trade Commission (1957) 243 F. 2d 716; Federal Trade Commission v. National Lead Company (1957) 352 U.S. 419; Moog Industries, Inc. v. Federal Trade Commission (1956), 238 F. 2d 43.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Respondent's appeal is denied, and it is directed that an order issue accordingly.

January 5, 1959.

[fol. 74] BEFORE FEDERAL TRADE COMMISSION

CALVIN R. PEERY, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

Q. Where is your address, Mr. Peery?

A. My home address?

Q. Yes.

A. 677 Northeast 73rd Street, Miami.

Q. And are you self employed or do you have an employer?

A. I work for the corporation. I am President of the corporation, Peery Industries, Inc.

Q. And what kind of business is that, sir?

A. Well, I handle automobiles. The automobile line.

Q. Now, is Peery Industries, Inc. doing business in the City of Jacksonville as well as Miami?

A. Not at the present time. In Jacksonville, but I am getting ready to move my business to Miami.

Q. Now, at one time did Peery Industries with you as President operate in the City of Jacksonville?

A. That is right.

Q. And in what line of business at that time, Mr. Peery?

A. I had a service station at 2057 Main Street, a Sunoco Station.

Q. A Sunoco Station?

A. That is right.

Q. Did you own that station or operate it under a lease?

A. Under a lease.

. . . . . .

[fol. 75] Q. Now, had you previously operated any other service stations, Mr. Peery?

A. Not in Florida, no. I had——

Q. Have you elsewhere?

A. Up in Maryland, yes. I had

Q. And for what company, or what brand of gasoline did you sell?

A. Amoco?

. . . . . .

Q. Now, at approximately what time did you start operating that station?

A. July, 1955.

Q. Now, what did you sell at that station?

A. Well, I sold Sun Oil Company products, along with competitive products. We had there some automobiles. I had some cars there.

Mr. Henderson: Keep your voice up.

Hearing Examiner Piper: Speak a little louder, please.

Q. The Sun Oil included what?

A. Gas, oil, greases.

Q. You purchased all your gasoline for that station, insofar as the petroleum products were concerned, from the Sun Oil Company?

A. That's right.

. . . . . .

Q. I now show you Commission's Exhibit 12-A through M, that are in evidence, and ask you to examine the signatures at the bottom of the page. I notice that one of them is signed by Roy Clark.

A. He works for me.

[fol. 76] Q. You recognize his signature?

A. Yes, that looks like it.

Q. And turn it over and I think you will find your signature at the bottom of the page. Is that your signature?

A. Right.

Q. Now, those invoices represent purchases by you from the Sun Oil Company?

A. Correct. The last one was signed by Holland. He worked for me, also.

Q. You recognize his signature?

A. That's right. Yes, sir.

Q. Now, according to these invoices, Mr. Perry, you paid a unit price of .166 for the gasoline purchased by you from the Sun Oil Company up to and including January 31, 1956?

Hearing Examiner Piper: Is your answer yes?

The Witness: Yes.

Hearing Examiner Piper: Don't nod, we can't get it. Don't nod.

The Witness: Yes.

Q. The next invoice that I see in here is one dated February 16, 1956, at which time you purchased gasoline at a unit price of .134. I want to ask you, if you recall whether or not that was the first date you had received that lower price?

A. To the best of my knowledge, yes.

[fol. 77] Q. That is the first date?

A. To the best of my knowledge.

Q. And up until that time, even though there is no invoice for a few weeks there, you started at .166 for your gasoline?

A. That's right. These invoices are correct to the best of my knowledge. I mean my signature is on them and they are copies of invoices, so they would be correct. Now, I don't know for sure whether this invoice you are referring to is for the reduced price. I think so.

Q. Yes, sir.

A. Of course, I have all my own invoices, but I think that's correct.

. . . . . .

Q. As the time went by were you increasing or decreasing in gallonage?

Mr. Henderson: May we have the periods of time referred to?

Mr. Wilson: I referred to it, if Your Honor please, from the date of his operation of the station. That was my preparatory remarks.

Mr. Henderson: I understand the question well.

Hearing Examiner Piper: Will you rephrase the question?

[fol. 78] Mr. Wilson: I'll rephrase the question.

Hearing Examiner Piper: All right.

By Mr. Wilson:

Q. When did you first start operating this station?

A. In July, '55.

Q. Now, from July, '55, up until the first part of December shall we say, are you in a position to tell us whether or not you were increasing your gallonage month by month or whether it fluctuated? Just give us an idea how your business was being conducted at that time, how you were fixed at that time as to increase or decrease?

A. Well, when I first took the station over I started to increase the gallonage, but I don't recall just when this price discrepancy came along, but then my business began to drop back some right after we got this other cut in price and I think that's when this gas war thing started, and so forth, naturally my business increased then.

Q. Let me ask you this. Your gallonage was increasing, according to your statement, up until the time you say that there was a discrepancy in price?

A. Uh-huh. (Indicating the affirmative.)

Q. Now, would you tell to the Examiner and for the record how you happened to learn of this so-called discrepancy in price you mentioned?

A. I had customers drive in and ask me the price of gasoline. In fact, the first one I remember he asked me, I don't know what they were driving at, I told them they could see it on the pump. They said, "Well, over on Pearl ".

[fol. 79] Mr. Henderson: I object to this, Your Honor, please. It's hearsay.

Hearing Examiner Piper: It would be hearsay if it offered to prove the truth, but he gave it, offered it for the purpose of showing he heard it, but not to prove it.

The Witness: That's exactly right.

Hearing Examiner Piper: The objection is overruled You may answer. Go ahead.

A. They said, "I can buy gas over on Pearl Street at 2c," I believe, 2c a gallon less, if I'm not mistaken.

. . . . . .

Q. Now, do you recall an attorney investigator from the Federal Trade Commission calling on you?

A. Yes, sir.

. . . . . .

Q. You do recall him talking to you?

A. Oh, yes. Yes. Oh, yes, after Mr. Crabtree and the other gentleman was there.

Mr. Henderson: Now, please answer the question and don't volunteer.

[fol. 80] The Witness: Oh, okay.

. . . . . .

Q. Do you recall saying to the attorney examiner that these gentlemen, Mr. Crabtree and Mr. McClung called you around the first part of January 1956?

A. Yes, they called on me.

Mr. Henderson: I object to that.

The Witness: I couldn't say just what date it was. I wouldn't say, I don't know. They called on me and I told the attorney they did call on me.

. . . . . .

Q. All right, sir. Now, Mr. Peery, did you after learning of the lower price that Mr. McLean was getting, say anything at all about that to the representatives of Sun Oil Company?

A. I did.

Q. What, if anything, was done about that?

A. Well, there wasn't anything done about it at all.

. . . . . .

Mr. Wilson: Yes, so I now ask him whether or not he had said anything about that to the Sun Oil Company.

[fol. 81] Hearing Examiner Piper: That might have been six months later.

Mr. Wilson: I see.

By Mr. Wilson:

Q. Did you on or about that time, Mr. Peery?

A. I did.

Q. Well, excuse me now.

(Continuing) On or about that time, meaning of course, the time you learned of the lower price, say anything to the Sun Oil Company about that?

A. I did, yes.

Q. And what, if anything, did they say to you?

A. Well, they said there wasn't anything they could do about it.

Hearing Examiner Paper: Who is "they"?

The Witness: Mr. Elbrey. I think Mr. Elbrey was still calling on me at that time. I don't recall.

Q. Did you call the Sun Oil Company or say anything to their salesmen, once, twice or do you have any idea as to the number of times you might have done that?

[fol. 82] A. No, I wouldn't have. I know I talked to the salesman of Sun Oil Company. Whether I ever talked to the office or not, I wouldn't say I couldn't be positive.

Q. Now, according to Commissioner's Exhibit 1-A through M now in evidence, Mr. Peery, on the latter part of December up until February the 16th, 1956, you were paying $166 a tit price for your gasoline and were not receiving any CPA?

A. That is correct.

Q. And by CPA what is meant, sir, if you know?

A. I don't follow you.

Q. Well, you were not receiving any price adjustment from Sun Oil Company?

A. No. I mean that is what I paid for it. Our canceled checks, of course, will show that and I didn't receive anything in return as an adjustment or refund or credit back.

A. Well, I was at 11th and Main—oh, on up to Pearl Street, let's, see—approximately thirteen or fourteen blocks.

Q. Now, I understand in looking through here, and I direct your attention to certain dates and so forth, that you did not, that you were not operating on Sundays.

[fol. 83] A. No, not all the time. I was open on Sunday's

when I first took over there, but I close on Sundays. Dates in the book would indicate when I closed on Sundays.

. . . . . .

(The paper referred to was marked Commission's Exhibit 20 for identification.)

By Mr. Wilson:

Q. Now, these—I hand you the books, Mr. Perry, and I'll ask you if the entries made therein weren't made in the usual and customary course of business?

A. Yes, sir, they were.

Q. And it reflects a day to day picture, shall we say, of your business?

Mr. Henderson: Now, I object to the constant leading, Your Honor, please, and I ask that the gentleman himself testify what it represents. Sorry, but I asked for the right to examine this book beforehand.

Hearing Examiner Piper: He's merely identifying it for——

The Witness: Carry the day to day gallonage consumption; that's what the records represent.

. . . . . .

Q. Now, Mr. Perry, is it important to you as an operator [fol. 84] of a service station whether or not you gain or lose gallonage in ways other than the sale of the gasoline?

A. Well, yes, because you not only lose your profit on the gas but when you lose your customers and the gallonage, you are losing your possible oil changes, lubrication, and service work. Of course, you are not going to know what you lose if a man pulls in and pulls out and says, "Well, I am sorry, I can buy it cheaper down the street." You don't know what you might have sold the man. He leaves you and that is something you will never know. He is gone.

. . . . . .

Q. Your real business is selling cars, isn't it?

A. Yes, sir.

Q. What cars do you sell, Cadillacs?

A. Just cars.

Q. Cadillacs?

A. Some. What I can.

Q. And you have quite a used car business, have you not?

A. I have had in the past. Not at the present time, no.

Q. You had a used car business when you operated the station at 2057 Main Street in Jacksonville, didn't you?

A. That is correct.

Q. And you had many used cars on your lot in connection with your station out there?

A. Yes, I had some used cars, yes.

Q. And you advertised very extensively that you were selling used cars?

A. Yes, that is right.

. . . . . .

[fol. 85] Q. Now, Mr. Peery, as a matter of fact, as early as November of 1955, you gave a 30 day notice to terminate your contract with Sun, did you not?

A. That is right. That is mine there.

. . . . . .

Q. And at that time you asked that your agreement with Sun Oil Company be terminated at your request?

A. That is right.

Q. Why did you do that?

A. Well, I wanted to get out. I was, as they say, you are not happy why you want to make a change.

Q. And that was your own action to make the change, was it not?

A. Yes, it was.

Q. And

A. They didn't force me.

Q. And you wrote that letter?

A. That is right. They didn't ask me for it or they didn't.

Q. And you did not however, get out as of January 17, 1956, which would have been the end of the first six months?

A. That is right.

Q. But you did get out on September 7, 1956, is that right?

A. That is right. The 7th or the 8th. I forget the exact date.

Q. And that was the result of a mutual termination between you and Sun Oil Company?

A. Yes, sir.

Q. And this was during the time that you handled the station but primarily you handled your second hand automobiles or cars, is that correct?

[fol. 86] A. That is right.

Q. Now, during the time that you were with Sunoco, you were speaking of this gallonage. You said you made one complaint that was to Mr.—what was his name, Elbey?

A. I think Mr. Elbey was still there. I am not positive.

Q. And my recollection is that you made that about February of 1956?

A. No, I made it before that, sir, before February. In February, I think we were in this gas war at that time if I am not mistaken.

Q. Well, all right. Was it in January then?

A. You are talking about the price discrepancy?

Q. I am talking about when you talked with Mr. Elbey about the price.

A. It was shortly after they cut the price over on Pearl Street. Now, whether it was December or January, I couldn't tell you. I will be glad to—if I have my records or actual knowledge of when it was, I will be glad to tell you when it was.

Q. Was it sometime after they cut the price on 19th and Pearl?

A. That is right, yes. Now, when it was, I couldn't tell you.

Q. And if that price was cut then at the very end of December, it had to be after that time?

A. Yes, sir.

Q. That is December, 1955?

A. That is right because I didn't say anything to him until after the price was cut over there.

Q. And that is when you talked to Mr. Elbey?

A. That is right.

Q. Now, where did you talk to him?

A. At the station.

[fol. 87] Q. And what did you say to him?

A. I asked him about the price cut. I said, "The people are driving in and asking me the price of gas and driving out. They tell us they are sorry but they can buy gas over on Pearl Street." I believe it was two cents a gallon less, and he said, "Well, I don't know what we can do about it." He said, "We have to try to meet competition," and they had put a new station in over there and I believe it was a Super Test. I am not sure, and of course they had whacked their price down in being a new station. Of course, Sunoco they dropped their price, I think, to meet competition across the street.

Q. And the Super Test station across the street had dropped their price as much as 7c below yours, hadn't they?

A. I don't know what they dropped it to.

Q. Did you ever hear that?

A. I knew they dropped it quite a bit, but I didn't know the actual amount, no, sir, I didn't.

. . . . . .

By Mr. Henderson:

Q. In December our records show you purchased 40,480 gallons, which is substantially what you purchased in September and October. Do you think that is correct?

A. I think so, yes.

Q. And in January and February, 1956, you purchased 19420 gallons, which would be about two loads?

A. About two loads. My tickets would show that.

Q. You don't deny it, do you?

[fol. 88] A. No, I don't deny it because I have my tickets. My tickets would show that much and would show more than that. I would pay for my sales tickets.

Q. Was there a general price drop in about March of 1956?

A. The latter part of February.

Q. Latter part of February, beginning of March?

A. Somewhere around latter part of February?

Q. Then the gallonage went up, did it not?

A. Oh, sure. Yes, it did.

Q. And your gallonage went up then about 5,000 gallons a month for the next three months.

A. Somewhere around there, yes.

Q. And then it dropped down in June and July to pretty near 5,000?

A. During the gasoline war, of course, we were all busy. Must have stored up somewhere.

. . . . . .

Q. Now, Mr. Perry, you began to lose gallonage immediately after August of 1955, did you not?

A. That I couldn't say. The record will show that, what I bought, what I purchased, which I will have to check to tell you exactly what I did lose.

Q. Didn't the Super Test lower prices hurt you?

A. It could have.

Q. Did it?

A. Something hurt me.

. . . . . .

A. I won't say that Super Test hurt my business. They didn't say they would go to Super Test and buy the gaso [fol. 89] line. They said, "I can buy this gasoline for less money over on Pearl Street," and that was the remark my customers made to me when they drove off. Two cents a gallon less. They didn't say anything about Super Test. They could go down Main Street, out somewhere on Main Street, which always had a lower price than I had.

. . . . . .

Q. Tell us, then, Mr. Peery, why it has been a little, a little over a year you knew Mr. Elbey; how long had you been dealing with him?

A. Well, Mr. Elbey was there when I took over in September of—July of 1955.

By Mr. Henderson:

Q. Now, we gave you plenty of opportunity to change it.

A. Well, I told you I wasn't sure, and I thought it was Mr. Elbey.

Q. You are not sure who you talked to, is that correct?

A. Absolutely. Now, whoever followed Mr. Elbey, or came after Mr. Elbey, was the man I talked to.

Q. Now, this man, or that man, now just fix the exact date or within some limitation of when that conversation was.

A. I couldn't tell you. I really don't know.

Q. You wouldn't even try to fix it by the month?

A. It could have been December.

Q. Well, let's don't have the could have been.

A. Well, I don't know. I couldn't tell you.

Q. You are making a pretty good charge against the company and I would like to have good testimony.

[fol. 90] Mr. Wilson: Now, it is getting pretty close to brow-beating this witness, Your Honor.

Mr. Henderson: Well, I have no intention to brow beat him and I will try not to.

Hearing Examiner Piper: I think it is a charge brought by the Government and he is a witness.

The Witness: I didn't make any charge, and I said that it has been too long and I have forgotten who I talked to.

. . . . . .

Q. All right, can you recall when you started to close on Sundays?

A. No, I don't recall. I can't recall the date I closed on Sundays. My gas book will show what date my last Sunday was.

Q. And you did open on Sundays when you started and then you closed?

A. That is right.

Q. Of course, that made some difference in the gallonage, would it not?

A. Oh, sure. You sell some gas on Sunday, naturally.

. . . . . .

Q. Now, Mr. Peery, you testified on cross examination [fol. 91] that you were not happy and wanted to get out. You didn't state any reasons at that time. Would you like to go into those reasons at the present time?

A. Well, one thing, I had more on me than I could handle, help problems, and so forth. It wasn't too much other.

Q. Do you have any other reason that you can think of why you wanted to cease your operation with that station?

A. Well, I will say, not in writing, but tentatively Sunoco Oil Company said they would try to give me another lift in there, something we could do a little more business with service which we never did get and they didn't tell me when I took the place that they definitely would. They said they would see what they could do for me. That was the words that they quoted to me, and, of course, that never materialized and I got more or less disgusted with the whole thing.

. . . . . .

Q. Now, when that gas is put into that underground storage tank, don't you usually have gasoline that is left on hand from the other drivers?

A. Yes, we never run out.

Q. So it is possible, isn't it, for the actual purchase invoices to not reflect the true sales picture?

A. Oh, that is true, sure, because you may have a lot of gas left over, sure. I may get a load of gas and have 1500 or 2000 gallons on hand and the next time I get it I may have only six or seven hundred. It is hard to tell.

. . . . . .

[fol. 92] GILBERT V. MCLEAN, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

Q. What is your full name, Mr. McLean?
A. Gilbert V. McLean.
Q. Is that V as in Victory?
A. Yes.
Q. And your address please.
A. 557 W. 16th.
Q. Where are you employed, Mr. McLean?
A. Kraft Paper Company.
Q. Is that Florida?

A. Georgia.

Q. Georgia. Now, prior to your employment with this company in Georgia, in what line of business were you engaged?

A. Maintenance machinist, shipyard, before that.

Q. Prior to that?

A. Sun Oil Service Station.

Q. Where was this Sun Oil station?

A. 19th and Pearl.

Q. And can you tell us the date that you started operating that station?

A. February 22, 1955.

Q. And what did you sell at this station, Mr. McLean?

A. Gasoline, oil, station products. Kind any station usually sells.

Q. Sun Oil Company?

A. Sun Oil Company.

[fol. 93] Q. Purchased all your gasoline and oil from Sun Oil Company?

A. I did.

Q. I now show you Commission's Exhibit 1-A through U—is that supposed to be U? Mr. McLean, and I'll ask you if that is your signature appearing at the bottom of those invoices?

A. Yes, it is.

Q. Now, according to these invoices, Mr. McLean, you paid a unit price of .171 for your gasoline up until 12-27-55 at which time Sun Oil Company granted you a price adjustment of 1.7, is that correct?

A. That's right.

Q. And on this particular date, which is Commission's Exhibit 1-R, there is an indication or notation that on that particular day, well,—there is an indication—strike that, that on December 30, 1955, you purchased 2,700 gallons of gasoline at an .171 for a total amount $461.70, to which was applied the price of adjustment of .17.

Hearing Examiner Piper: You mean .017?

Mr. Wilson: They have it here as .17, and here they have it as .17? Actually, it is .17, isn't that correct?

Mr. Henderson: Yes.

Hearing Examiner Piper: Well, the first figure represents cents per gallon. 17 cents.

[fol. 94] Mr. Wilson: That's right.

Hearing Examiner Piper: So it would have to be .017, because .17, that is 17 cents, as I understand it from the complaint it was 1.7 10th?

Mr. Wilson: That's right.

Hearing Examiner Piper: Or, .017.

Mr. Wilson: All I know is what they have on the invoices.

By Mr. Wilson:

Q. I'll ask Mr. McLean this, isn't it true that the price we deducted on adjustments granted you was 1.7 percent?

A. Yes, it was.

Q. Regardless of what points were made on these invoices and on the day we are talking about, which was in December, 1955, was an indication you received credit of $45.90?

A. Yes, sir.

Q Now, Mr. McLean, what were the names, if any, of any of the other service stations on or near 19th and Pearl Street in Jacksonville?

A. One at 11th and Main, 35th and Main, and I believe 60 or 65th and Main.

Mr. Emmerglick: I wonder if the witness understood the question that is there?

[fol. 95] Hearing Examiner: Read that question, please.

(The reporter read the question as follows:

"Question: Now, Mr. McLean, what were the names, if any, of any of the other service stations on or near 19th and Pearl Streets in Jacksonville?")

A. The names?

By Mr. Wilson:

Q. Yes, the names.

A. Mr. Peery, Mr. McClung, Mr. Crabtree.

Q. Those weren't all the stations that were closer to you than those particular stations you named? Other than Sun Stations? Other than Sunoco Stations?

A. Yes, there was.

Q. What were they?

A. Super Test, Royal Arrow, Richfield, Sinclair, Pure Oil.

Q. Where is this Pure Oil Station?

A. 20th and Pearl. 21st and Pearl.

Q. Two blocks away? Is there a Shell station near you?

A. On down the other side of Sinclair, down about 22nd or 23rd and Pearl.

Q. Now, were all of these stations operating at the time you commenced operations at this Sunoco Service Station at 19th and Pearl?

A. All but one.

Q. Which one was that?

A. Super Test.

Q. Well, when was that station built?

[fol. 96] A. I'm not sure. It was within three months I think, July, August or September. I'm not sure which one it was.

Q. It was one of those months?

A. Yes.

Q. July, August, or September?

A. Yes.

Hearing Examiner Piper: Of 1955?

The Witness: Of 1955.

By Mr. Wilson:

Q. Do you have any reason for believing that it couldn't have been in October of 1955?

A. No, I don't.

Q. I just——

Hearing Examiner Piper: What he is trying to ask you is why do you pick these three months?

The Witness: I just——

Hearing Examiner Piper: That's your best recollection?

The Witness: Yes, sir.

[fol. 97] By Mr. Wilson:

Q. Now, how did the retail prices of the Super Test station across the street compare with yours, Mr. McLean?

A. They was two cents less.

Q. Two cents less all the time?
A. Not all the time.
Q. Were there times when it was more?
A. There were times when it was more.
Q. Times when it was less than a cent?
A. Less than a cent?
Q. Yes.
A. Lower than mine?
Q. Yes.
es.
. And when was that, do you recall?
A. When the station opened. It had a grand opening, and it was dropping, I think, to 21.9 and then two or three times after it was opened in December, it was dropped on the week end, different prices.

Hearing Examiner Piper: Did it carry a single grade of gasoline like Sunoco?
The Witness: All I know is Super Test.
Hearing Examiner Piper: I mean, one grade?
The Witness: I know it carried—it was high test and regular.
Hearing Examiner Piper: It had two grades?
[fol. 98] The Witness: Two grades.
Hearing Examiner Piper: Two prices?
The Witness: Two prices.
Hearing Examiner Piper: You only had one?
The Witness: I only had one.

By Mr. Wilson:

Q. Was the price of your one grade two cents higher than the price of the highest grade of Super Test or the regular? How—do you remember that, which it was?
A. Regular.
Q. It was two cents higher than——
A. Their regular gas.
Q. And how did it compare with the Ethyl gasoline sold by them?
A. That I don't know.

Hearing Examiner Piper: That was higher than their low?
The Witness: That's right.

[fol. 99] By Mr. Wilson:

Q. Now, up until the time—let me ask you this. Did the discrepancy, or rather the differential of two cents in the price of gasoline across at Super Test affect you competitively at Sunoco?

A. No, it didn't.

Q. Well, did there ever come a time when you were affected competitively by Super Test?

A. Yes, there was.

Q. And when was that, sir?

A. The dates I don't know, but like I said before, it was two or three times they had dropped on me on the week ends.

Q. Yes.

A. And that's when I could tell.

Q. And what, if anything, did you say to anyone about that, or attempt to do about that?

A. I talked to the sales man about it.

Q. Now, who was that sales man, Mr. McLean?

A. Well, Bill Elbey to start with.

Q. Yes?

A. And then I believe it was Mr. Harper.

Q. Uh-huh.

Hearing Examiner Piper: Harper?

Mr. Wilson: Harper.

By Mr. Wilson:

A. Now, do you recall, can you fix to the best of your ability, the time that you made these calls to Sun Oil Company, or whoever it was, the time, whether it was made by [fol. 100] telephone or whether the salesman came around there, you talked to him about it, when it was, just how it was?

A. The salesman came around and I talked to him about it and I called up Mr. Beardley at Sun Oil and talked to him.

Q. Excuse me right there. Did you know Mr. Beardley's capacity with Sun Oil Company? What his capacity was there, his occupation? His job?

A. Yes.

Q. And what was it?

A. Assistant Region Manager.
Q. Yes.

Hearing Examiner Piper: He asked you when this occurred. Do you know when?

The Witness: No, sir, I don't know the date.

Hearing Examiner Piper: Well, months?

The Witness: I couldn't be sure about that.

Hearing Examiner Piper: Year?

The Witness: 1955.

Hearing Examiner Piper: What part of 1955?

[fol. 101] The Witness: After Super Test opened up.

Hearing Examiner Piper: Which was in July, August, or September? Whatever date he opened up. From then on, and after these Sunday occurrences, when you said he dropped the price on Sunday?

The Witness: No, on weekends.

Hearing Examiner Piper: Weekends?

The Witness: Friday, Saturday, sometimes it would be Saturday or Sunday.

Hearing Examiner Piper: You said week ends. I had forgotten. It was after those occurrences that you contacted Sun Oil Company?

The Witness: Well, I think I contacted once or twice the time they dropped to see what I could get, because I needed a low price.

Hearing Examiner Piper: But you don't know exactly when it was?

The Witness: No.

[fol. 102] Hearing Examiner Piper: Go ahead.

By Mr. Wilson:

Q. What did they say or do at that time, Mr. McLean, when you called it to their attention?

A. They said that they couldn't do anything about it right then. They couldn't do anything about it.

Q. Now, did there come a time when you were given a price reduction by the Sun Oil Company?

A. Yes, there was.

Q. And do you know the date when that was?

A. It was, I believe, the 27th of December.

Q. 1955?

A. 1955.

Q. Now, at that time, at what price were you selling your gasoline?

A. 28.9, I believe.

Q. Now, Mr. McLean, tell us, tell the Examiner, and state for the record, the circumstances under which Sun Oil Company at that time gave you this price adjustment?

A. Wait a minute, do you mean was there any kind of an agreement?

Q. Yes, what kind of an understanding?

Hearing Examiner Piper: How did it happen?

Q. What kind of an understanding did you have with Sun Oil Company leading up to them giving you this price adjustment?

A. Well, I think I had been after them to get that price adjustment and on that day—I was closed for one or two [fol. 103] days—and that day the salesman came around, Mr. Harper, and he said—I was talking to him about it and he said if it continued, if they dropped again, Super Test dropped again, that they would try to do something about it.

He stayed around, I guess, 30 minutes or an hour and then he went off and on that day they did drop their prices and he came back and they gave me an adjustment and I dropped mine.

Q. Now, is that all—what were you required to do if anything to get the adjustment?

A. To take a cut.

Q. How much of a cut?

A. One point seven.

Q. 1.7 or 1.3?

A. No, that was the adjustment. I don't remember exactly.

Q. Wasn't there something said to you at that time about you reducing your price?

Mr. Emmerglick: I object to the leading question on the matter of what is the essence of the issues. Now, I think Counsel has been advised from time to time that there is a point beyond which he should not lead and I think it gets into the heart of the issue and I think he should not lead and put words in the mouth of the witness.

Mr. Wilson: If Your Honor pleases, this witness on the

stand stands in the same position, practically, as does the Respondent in this case.

[fol. 104] Mr. Emmerglick: I don't think so. He has been called as a witness by the Government.

Mr. Wilson: He is named in there as a co-conspirator in Count 2 of this complaint, and although he is not an adverse witness and I am not attempting to lead him and I don't think that my questions are suggestive of that, and I am trying to speed it a little bit.

Mr. Emmerglick: Well, the rules of practice, Mr. Examiner, provide that until the bias of the witness appears and the claim of bias is made and is sustained, that there is no proper predicate whatever of Counsel attacking the witness and treating him as though he were hostile.

Nothing of that kind appears here.

Hearing Examiner Piper: I am quite familiar with the rules.

Objection sustained.

By Mr. Wilson:

Q. Mr. McLean, you were granted, I believe, and you testified the adjustment price of 1.7 cents a gallon, is that correct?

A. Yes, sir.

Q. Now, state whether or not you had an understanding with Sun Oil Company as to what you were to sell this gasoline for, the price that you were to sell your gasoline for, and whether or not the 1.7 adjustment was to be given you only—strike that.

[fol. 105] State whether or not, Mr. McLean there was any other factors or understanding connected with your granting by Sun Oil Company of the 1.7?

Mr. Emmerglick: Now, may I object again.

Q. (Continued) Price reduction.

Mr. Emmerglick: I submit, Your Honor, that understanding is a very conclusionary word. Can't we get at what was said by both parties to this conversation on that issue?

It seems to me if Counsel would ask the witness the whole story of what was said in connection with this,

we would get at the facts. I object to the form of the question.

Hearing Examiner Piper: Objection sustained.

By Mr. Wilson:

Q. Well, what was said to you if anything by Sun Oil Company or by representatives of Sun Oil Company on the occasion of their granting you the 1.7 price reduction?

Hearing Examiner Piper: He doesn't want the exact words.

A. Well, I don't guess I quite understand what you mean.

Q. I will ask you this, then: Weren't you required to do something to obtain that?

[fol. 106] Mr. Emmerglick: I object to the question as being leading and as calling for a conclusion.

Mr. Wilson: Now, how could it be leading and calling for a conclusion? It is asking him if he knows of anything he was required to do.

Hearing Examiner Piper: It is leading, but he has indicated that he doesn't understand the question, so I will let it stand.

There is no question but what it is leading. Read the question.

(Question read as follows:

"Q. I will ask you this, then: Weren't you required to do something to obtain that?

A. To obtain that price?

Hearing Examiner Piper: Yes.

A. No, I dropped my gas but I wasn't required—I didn't have no agreement with them to do anything as far as lowering my price or raising my price or anything.

There was no agreement made.

By Mr. Wilson:

Q. Was there anything said to you about reducing your margin of profit?

A. Yes, my margin of profit was reduced.

[fol. 107] Q. Did they say that to you?

A. Yes, sir.

Q. How much was it reduced?

A. That I don't remember.

Q. Well, I will ask you this: How much lower—well, let me ask you this—after you reduced the price of your gasoline, what did you sell it at?

A. 25.9.

Hearing Examiner Piper: What had you been selling it at?

The Witness: 28.9.

By Mr. Wilson:

Q. So that was a reduction of 3 cents a gallon, right?

A. Yes, sir.

Q. Did they ever come—strike that.

Did Mr. Harper or any representative of the Sun Oil Company say to you that they would attempt to keep this differential of three cents?

A. No, sir, not that I remember.

Q. But on that particular time did he say that to you?

Mr. Henderson: He said he didn't remember any how.

A. It was made that I wanted and they state that I drop my gas to that price according to Super Test across the street, but as far as dropping it any lower or raising it——.

Q. You were to drop your——

[fol. 108] Hearing Examiner Piper: Wait a minute, I don't fellow that. Would you read it back?

(Answer read as follows:

"A. It was made that I wanted and they stated that I drop my gas to that price according to Super Test across the street, but as far as dropping it any lower or raising it—")

Hearing Examiner: What was the price of Super Test across the street at that time? Do you remember?

The Witness: I believe it was—mine was 25.9 and theirs was 23.9 or 24.9.

Hearing Examiner Piper: But they had just dropped

it as you said before that on that week end or that day that the man was there, they had dropped it after he had been there and they came back and gave you this 1.7 cent discount? Do you remember saying that just a few minutes ago?

The Witness: I believe they dropped their price to 25.9 and then I dropped mine to 25.9 and then they dropped they dropped theirs below another cent.

Hearing Examiner Piper: That was all the same day?

[fol. 109] The Witness: The next day. The following day they dropped theirs.

Hearing Examiner Piper: But the 25.9 was the drop in the first place on their part?

The Witness: It was 24 or 25. I am not sure.

Hearing Examiner Piper: But hadn't they been selling it at a higher price?

The Witness: They had.

Hearing Examiner Piper: When you were selling it at 28 or 29? What were you selling it it?

The Witness: 26.9.

Hearing Examiner Piper: And then they dropped their price?

The Witness: They dropped it. It must have been that they dropped it to 24.9.

Hearing Examiner Piper: At which point you dropped yours to 25.9?

[fol. 110] The Witness: I dropped mine to 25.9.

Hearing Examiner Piper: And that was after?

The Witness: After they dropped.

Hearing Examiner Piper: Yes, but it was after this gentleman had been around to see you and you had asked him to do something about it?

The Witness: That is correct.

Hearing Examiner Piper: And he had come back?

The Witness: That is right.

Hearing Examiner Piper: And said, "We will do something about it now"?

The Witness: That is right.

Hearing Examiner Piper: And he gave you this discount?

The Witness: That's right.

[fol. 111] Hearing Examiner Piper: And then you dropped your price?

The Witness: And then I dropped my price.

Hearing Examiner Piper: All right, go ahead. I think I got that day straightened up.

By Mr. Wilson:

Q. So you reduced your price at that time after this visit from Mr. Harper from 28.9 to 25.9?

A That is right.

Q. Now, you testified that you were granted an allowance of 1.7, so that would leave a remainder of 1.3, would it not?

A. I suppose so. I don't know anything about the figures.

Hearing Examiner Piper: Well, 1.7 plus 1.3 equals three.

The Witness: Well, I can say yes, but the figures I don't remember anything about that, the figures.

By Mr. Wilson:

Q. And it is that 1.3 that you didn't know about but which you testified was the reduction in profit that you were to take?

A. Yes, sir.

Q. And to sell their gasoline and as I understand your testimony to sell this gasoline at 25.9?

A. That is right.

[fol. 112] Q. Now, was anything said to you, Mr. McLean, by any representative of the Sun Oil Company that you would continue to get these reductions in order to stay within one cent of Super Test?

A. Nobody said that I would continue to get it.

Q. Did you continue to get it?

A. I did.

Q. Now, this is your record book, is it not, Mr. McLean?

A. That is right.

Q. Can you determine from that the number of gallons sold by you in each particular month?

A. I can.

Q. I will now hand this to you and ask you to look at it for the month of October, 1955, and state for the record the number of gallons of gasoline sold by you in that month?

A. 6,495.8.

Q. Now, look at the month of November, of 1955?
A. 5,946.1.
Q. Now, look at the month of December, 1955?
A. 8,368.
Q. Now, look at January, 1956?
A. 32,115.4.
Q. Now, do you have any figures for February, 1956?
A. 20865.
Q. Now, when did you give up that station?
A. I believe it was——
Q. If you did?
A. Yes, I gave it up in February, I believe.
Q. Yes.
A. I believe the 20th. It shows the last date as that. I got the 18th here.

[fol. 113] Q. Now, you did 20,865 or rather you sold 20,865 in February, 1956. I will ask you whether or not you didn't have gasoline remaining in your tank after you ceased doing business?
A. No, I didn't.
Q. You were all out? Just 20,865 represents——
A. Well, now, I closed and I emptied the tanks as far as the pump would pump it.
Q. Did you sell that gasoline?
A. You mean the gasoline that was left in the tanks?
Q. Yes.
A. There was a rebate on that.
Q. You sold it back to the company?
A. Yes, sir.
Q. And how many gallons of gasoline did that make?
A. I don't remember. It wasn't but just a small amount that stays in the tank.
Q. But you get——
A. You can't pump that out.
Q. But you did get a rebate on that?
A. Yes, sir.
Q. Does your books reflect the amount that you received?
A. No, it doesn't.
Q. Now, in looking at your records there, is November the last full month in which you sold at the higher price?
A. The last full month, yes?

By Mr. Wilson:

Q. At the time you agreed to take the reduction of 1.3, Mr. McLean, had you figured out the operating, the [fol. 114] margin under which you would be operating at your station?

A. I think we figured it out. I think, I'm pretty sure I figured it out, but just on paper, and I don't have no records or anything. I don't remember now what it was.

Q. But at that time you thought you could afford the reduction?

A. I thought I could afford it.

Q. What if anything would lead you to believe that?

A. I had competition across the street. My gallons had been dropping and if I got a lower price I could pump enough gallons to make up what I had been making or more than I had been making since they had moved in.

Q. Now, is—tell us something about how traffic flows on Pearl and 19th, Pearl, along there where it comes from, will you, Mr. McLean?

A. There's plenty of traffic. Is all I know is people live out that a way.

Hearing Examiner Piper: Is it a highway?

The Witness: It is not a highway, but it seemed like the majority of working people that live out in that section go that street.

Hearing Examiner Piper: Is Pearl an arterial for 19th? You know what I mean by an arterial?

[fol. 115] The Witness: No, sir.

Hearing Examiner Piper: A through street with stop signs.

The Witness: That's right.

Hearing Examiner Piper: Or streets coming into it?

The Witness: Streets are coming into it. Pearl is a——

Hearing Examiner Piper: Through street?

The Witness: Yes, a through street.

Hearing Examiner Piper: Does it parallel Main Street?

The Witness: No, sir, Pearl goes all the way, I think to a river but I don't know the——

Hearing Examiner Piper: What direction does it run, north and south?

The Witness: It runs the same direction that Main Street runs.

[fol. 116] Hearing Examiner Piper: That's what I mean when I said parallel. Then it does parallel, runs the same direction as Main?

The Witness: That's right.

Hearing Examiner Piper: Is it east or west of Main Street?

The Witness: It is west.

By Mr. Wilson:

Q. Does Boulevard Street run into it?

A. No.

Q. Or cross it anywhere?

A. No, sir, not that I know of.

Q. Now, at one time, Mr. McLean, didn't you have a conversation with a Mr. McClung and Mr. Crabtree?

A. I did.

Q. Do you know what line of business they were in?

A. Yes, I do.

Q. What was that?

A. They were Sun Oil Station operators.

Q. Do you know where their stations are located?

A. Yes.

Q. Where were they?

A. 35th and Main, 60th—Tallulah and Main.

Q. What did you discuss with Mr. McClung and Mr. Crabtree?

[fol. 117] Mr. Emmerglick: I object to the question. This is a direct request for hearsay.

Mr. Wilson: Your Honor, please, those men will be called as witnesses.

Mr. Emmerglick: Then, they should be examined rather than have this witness say what they say.

Mr. Wilson: I asked what was discussed.

Mr. Emmerglick: I am afraid that the witness will start by stating the conversations of these other gentlemen.

Hearing Examiner Piper: The same objection will apply to their testimony, then we will never find out.

Mr. Emmerglick: I raise the question whether we want to introduce hearsay?

Hearing Examiner Piper: They are all going to testify.

Mr. Emmerglick: I don't know what they are going to testify to.

[fol. 118] Hearing Examiner Piper: If they are all going to testify—otherwise, I think the objection will be well taken. When they testify they will be asked what this gentleman said, and the same objection will apply.

Mr. Emmerglick: I submit this is an attempt to attack this witness without any basis. There is no reason why there should be an effort now, mind, if he admitted to McClung, there's nothing to indicate he is disputing anything that I have said. A——

Mr Wilson: I think we should have the question read back, maybe, Mr. Examiner.

Hearing Examiner Piper: Will you read the question?

(The reporter read the question as follows:

"Question: What did you discuss with Mr. McClung and Mr. Crabtree?")

By Mr. Wilson:

Q. What did you discuss with Mr. McClung and Mr. Crabtree?

A. Frankly, I don't know what all we talked about.

Q. Well, state whether or not you talked about the lower prices you were getting?

A. Yes, we did.

Q. Did you at any time relate to them the circumstances under which you had gotten it?

A. Yes, I had.

[fol. 119] Mr. Wilson:

Q. Your Honor, please, we have no further questions.

* * * * * * *

Cross-examination.

By Mr. Emmerglick:

Q. Mr. McLean, I show you Respondent's 1, which purports to be an advertisement of Friday, August 26, 1955, and ask you if you ever saw that advertisement?

A. Yes, I have seen this.

Q. Do I correctly read it as advertising a Super Test price of 21.9 at 28 Pearl Street, corner of Pearl and 19th?

A. That's right.

Q. Now, do you recall whether, although this is called Grand Opening, at the tap, this was indeed the day they opened, or did they open on some other day?

Mr. Wilson: Your Honor, please, he is examining from a document not in evidence.

Mr. Emmerglick: I'm not offering it from cross examination which is perfectly permissible———

Mr. Wilson: I'm just wondering if you offered it through recross examination. I'm sorry.

Mr. Emmerglick: I'll offer it later.

[fol. 120] The Witness: That appeared before the Grand Opening.

Mr. Emmerglick: About how long before the Grand Opening do you estimate that was?

A. That I don't know.

Q. Was it a day, a week, a month, or how much later, at your best estimate, can you recall?

A. I think it was the last of July.

Q. Prior to this Grand Opening special at 21.9 at August 26, what had been their price?

A. 26.9.

Q. 26.9?

A. I guess that's right.

Q. And when you saw this advertisement did you then, or shortly thereafter, get in touch with Sun and tell them about the price you were faced with?

A. Yes, I did.

Q. So that you began, shortly after August 26, 1955, to bring this condition to the attention of Sun, is that right?

A. I did.

Q. But it was not until the end of September, the end of December, you really got any help from Sun, isn't that right?

A. That's right.

Q. In other words, they didn't rush to give you a lower price, did they?

A. That's right.

Q. Now, I show you Respondent's Exhibit 2 for identification, which purports to be the ad of December 3, and ask you whether you saw that ad?

[fol. 121] A. I don't remember seeing the ad, but I remember them before Christmas cutting their price.

Q. To 21.9?

A. 21.9.

Q. Both of these appear to be week end price cuts, Mr. McLean, but how long a time would they hold the price down when they cut it on a Friday or Saturday?

A. Well, one time there I have known them to hold it for a week.

Q. For a week. Now, this whole process beginning back in August 26, 1955, what did that do to your gallonage?

A. It dropped.

Q. Did it drop pretty severely?

A. Long and long it kept dropping, all the way, up until I got help from Sun Oil Company.

Q. Yes. Now, you told us on your direct examination that you were closed for two days and then Mr. Harper came in one morning and on that very day he came back later and you got help. I want to ask you were those two days Christmas Day and December 26?

A. It was.

Q. So that when you got your help it was on December 27?

A. I'm pretty sure it was.

Q. Mr. McLean, will you describe in somewhat more detail the neighborhood which immediately surrounds the intersection at 19th and Pearl? Is it largely residential as you go down the street from 19th and Pearl?

A. It is.

Q. Now, are you familiar with the location of the Peery station?

[fol. 122] A. Yes.

Q. That's at 11th and Main?

A. Yes, sir.

Q. Is Main Street approximate to or near to this Courthouse? Main Street more than Pearl Street?

A. Yes, sir.

Q. And is 11th and Main the same kind of a neighborhood as 19th and Pearl, or is it a different kind of a neighborhood?

A. I'd say it is different.

Q. In what respect does it differ?

A. Well, maybe they have a school there behind the station for one thing, and it's not as thickly populated. To me it is not.

Hearing Examiner Piper: Which isn't as thickly populated?

The Witness: On 11th and Main, around 11 and Main.

Hearing Examiner Piper: That's where you were?

The Witness: No, sir.

Hearing Examiner Piper: But—I see. It is not as thickly populated at Peery's place as it was at yours?

The Witness: That's right.

[fol. 123] By Mr. Emmerglick:

Q. On the other hand, Mr. McLean, are there any business establishments around 11th and Main than at 19th and Pearl?

A. That's right.

Q. Now, how many lanes are the highway of Pearl Street as it crosses 19th?

A. Only two-way traffic.

Q. Two lanes. Now, at 11th and Main how many lanes wide there? Main Street?

A. Four.

By Mr. Emmerglick:

Q. Now, did you ever tell Mr. Harper that if you couldn't get help from Sunoco that you were going to quit?

A. I did.

Q. How many times did you tell him that?

A. A couple of times.

Q. Did you ever tell that to Mr. Elbey?

A. No, not that I remember.

Q. When did Mr. Harper——

A. Yes, I believe I did.

Q. Now, well, was the condition really that bad or were you just trying to put pressure on them?

A. Conditions were pretty rough. They was bad.

Mr. Emmerglick: Thank you. I have no further questions.

Redirect examination.

By Mr. Wilson:

Q. Now, Mr. McLean, would you open your book, please, to June of 1955 and give us the number of gallons that you sold that month?

[fol. 124] A. 7,145.5.

Q. And how about July, that is July, 1955?

A. 7,466.4.

Q. August?

A. 6,735.1.

Q. Now, according to the advertisements shown to you by Counsel pertaining to the Super Test station opening, are you now able to state definitely when the Super Test station opened?

A. No, I am not.

Q. You testified that you had seen their advertisements?

A. That is right.

Q. Can you state with any assurance whether or not Friday, the 26th, and Saturday, the 27th of August, was the date on which the station actually opened?

A. It didn't actually open on that day, no, sir.

Q. It had been in operation?

A. It had been in operation just a short time, two or three weeks.

Hearing Examiner Piper: During the several weeks that it was in operation before this "grand opening" sale they had a higher price than that, than in that sale, is that right?

The Witness: That is right.

Hearing Examiner: 26.9?

The Witness: That is right.

[fol. 125] By Mr. Wilson:

Q. And during the time of which the Examiner spoke, the weeks prior to this reduction in price, what was the differential existing between Super Test and your station?

A. Before that grand opening?

Q. Yes.

A. Two cents.

Q. Two cents. Now, are you or rather were you able to compete with Super Test with the two-cent differential?

A. I was.

Q. Now, if it pleases, Mr. McLean, I will ask you for one more figure out of the book and we will have the greater part of that year completed. That is for September, 1955.

A. September, 1955, 6,403.7.

Mr. Wilson: That is all.

Mr. Emmerglick: I have one thing more, Mr. Examiner.

Recross-examination.

By Mr. Emmerglick:

Q. Mr. McLean, according to the calendar for 1955, Christmas was on Sunday, and December the 26th was Monday, and I believe you have said that you got your price assistance on the 27th?

A. I believe it was.

Q. That is right, and now, I want you to go with me to December 28th and 29th. On the 29th, will you tell me what your posted price was and what the Super Test posted price was?

[fol. 126] A. The only way I could do that would be to divide. I am pretty sure it is 25.9.

Q. Well, let me ask you, what was the differential between your price and Super Test price two days after Sunoco gave you this price assistance?

A. I believe it was two cents less right on through.

Mr. Emmerglick: Thank you very much. I have nothing further.

Hearing Examiner Piper: Two cents less, what do you mean by that?

The Witness: I mean two cents lower than my price.

Hearing Examiner Piper: Their price?

The Witness: Super Test's price was two cents lower than Sunoco, mine.

Mr. Wilson: There is something about the answer that I would like the reporter to read.

(Answer read as follows:

"A. I believe it was two cents less right on through.")

[fol. 127] Redirect examination.

By Mr. Wilson:

Q. Now, what do you mean, Mr. McLean, "right on through"?

A. Until I got out of the station.

Q. You mean right on through by that?

A. January and February.

Q. Any subsequent discount or any subsequent differential at any time that there was a price change—let me get this straight, at any time there was a price change, it was still maintained at a two-cent differential?

A. That is right.

Q. And were there any price changes within that——

A. No, there wasn't, I don't believe. I don't believe there was any changes after that.

Hearing Examiner Piper: You mean that they stayed at 25.9?

The Witness: No, sir, they stated at 23.9. I stayed at 25.9.

By Mr. Wilson:

Q. Was there ever a time that you were only one cent apart?

A. I believe the day that it started, the 27th of December, '55. I believe that is when there was one cent but after that there was, I am pretty sure, two cents all the way through. I mean, until I closed.

Hearing Examiner Piper: There is something about this I don't understand.

[fol. 128] Mr. Emmerglick: Well, maybe you can clear it up.

Hearing Examiner Piper: I think you testified before that on the 27th of December there was—that was the day you got your discount for the first time?

The Witness: That is right.

Hearing Examiner Piper: That that day Super Test dropped their prices?

The Witness: That is right.

Hearing Examiner Piper: From what to what, do you recall?

The Witness: I believe it was from 26.9 to 24.9 or 23.9. I am not sure which price it was.

Hearing Examiner Piper: But this ad shows that on December 3rd their price was 21.9?

The Witness: That is right. That was nearly a month before this came along.

Hearing Examiner Piper: This same month, but it was at least three weeks before?

[fol. 129] The Witness: That is right.

Hearing Examiner Piper: But at that time nothing happened as far as you are concerned?

The Witness: That is right.

Hearing Examiner Piper: Except that you probably lost business?

The Witness: I lost business. That is why I wanted help.

Hearing Examiner Piper: All right, but on this day where they again cut the price they didn't cut it so far this time?

The Witness: That is right.

Hearing Examiner Piper: They never did get down to 21.9 like these two occasions which were indicated by these ads?

The Witness: No, sir.

Hearing Examiner Piper: And I believe you said that you have at least the grand opening ad?

[fol. 130] The Witness: Yes, sir.

Hearing Examiner Piper: So their price cut on those two occasions was somewhat less?

The Witness: That is right.

Hearing Examiner Piper: But it was still considerably below your price?

The Witness: That is right.

Hearing Examiner Piper: After you received the price reduction from Sunoco and reduced your price to within two cents of Super Test's prices, did you maintain that price thereafter?

The Witness: Yes, I did.

Hearing Examiner Piper: Without any variation?

The Witness: I did.

Hearing Examiner Piper: Didn't they go up and down like they had been doing?

[fol. 131] The Witness: No, sir, they stayed there then

when they lowered their price and when I lowered my price, that is where we stayed.

Hearing Examiner Piper: From there then until you went out of business?

The Witness: That is right.

Hearing Examiner Piper: And that was on the 27th?

The Witness: It is when it started, yes.

Hearing Examiner Piper: Well, it stayed that way and there wasn't any more fluctuating?

The Witness: No, sir, I don't think there was.

Hearing Examiner Piper: After that date?

The Witness: That is right.

Hearing Examiner Piper: And was there any differential in price between—any further difference in price between you and Sunoco other than the 1.7?

[fol. 132] The Witness: No, sir, there wasn't.

Hearing Examiner Piper: It stayed that way?

The Witness: It stayed that way.

Hearing Examiner Piper: That was the price to the best of your recollection?

The Witness: Yes, sir.

Hearing Examiner Piper: Would your records so show?

The Witness: I believe it would, but you would have to do the figuring on it.

Hearing Examiner Piper: Well, I don't want to get into that. Then they didn't have any more of these big week ends where it came down to 21.9?

The Witness: No, sir.

Hearing Examiner Piper: And your present recollection is that from that time on when you got Mr.—what was his name—Harper to effect that adjustment for you in order to meet the competition aross the street for your purpose, [fol. 133] there wasn't any further price cutting, or they didn't go back to the old prices, they just stayed there?

The Witness: They just stayed there.

Hearing Examiner Piper: And they stayed and you stayed at your level?

The Witness: That is right, which was 25.9.

Hearing Examiner Piper: Which was two cents——

The Witness: Less than Super Test.

Hearing Examiner Piper: Yours was two cents above?

The Witness: Above.

Hearing Examiner Piper: Where did the one cent get in the picture then?

The Witness: That I don't know. The day it started they dropped, I think it was, to 24.9 and I dropped to 25.9 and I believe they went down the next day to 23.9 to be two cents less than mine.

Hearing Examiner Piper: And you stated that didn't bother you?

[fol. 134] The Witness: No, sir.

Hearing Examiner Piper: I believe that makes some sense.

By Mr. Wilson:

Q. And you stayed at this 25.9?

A. I stayed at this 25.9.

Q. And for how long did you stay at this 25.9?

A. From December 27th until I got out February the 18th or 20th. The 18th, I believe.

Q. Now, you were selling at 28.9 and you reduced to 25.9?

A. That is right.

Q. And you maintained that?

A. Yes, sir.

Q. There were no further reductions?

A. No.

Q. Now, was there any change in your margin of profit or anything like that?

A. There was.

Hearing Examiner Piper: No, he means during the period was there any change?

By Mr. Wilson:

Q. During this period that you maintained the 25.9, was there any change in your margin of profit?

A. No, sir.

Q. You were still operating under the same arrangement?

A. That is right.

[fol. 135] Mr. Wilson: That is all.

Mr. Emmerglick: That is all, thank you very much.

Hearing Examiner Piper: Just another question. During this period, this same period after you dropped your price, was there any arrangement or understanding between you and Sunoco that you would keep your price at that level?

The Witness: No, there was not.

Hearing Examiner Piper: Do you know anybody named Dietsche?

The Witness: Yes, sir.

Hearing Examiner Piper: Does he enter into this picture as far as you are concerned?

The Witness: No, sir.

Hearing Examiner Piper: All right, that is all.

By Mr. Wilson:

Q. You knew Mr. Dietsche, did you not?

A. I knew him as a Sun Oil Region Manager, I had no dealings with him.

[fol. 136] Hearing Examiner Piper: In other words, he was head man here, right?

The Witness: Yes, sir.

. . . . . .

By Mr. Wilson:

Q. Mr. McLean, do you know what reason, if any, led to the three cents reduction in price?

Mr. Emmerglick: I object to that question.

By Mr. Wilson:

Q. From that of the Super Test station?

Mr. Emmerglick: This has undertaken to search the inner working of the mind some, and I submit it's improper.

Hearing Examiner Piper: Well, if he knows, I don't—I will overrule the objection.

The Witness: I don't know.

Hearing Examiner Piper: Would you read the question? You heard the question. I'd like to hear it again myself.

[fol. 137] (The reporter read the question as follows:

"Question: Mr. McLean, do you know what reason, if any, led to the three cents reduction in price?")

A. No. I mean, he wants to know if there was any thing connected between me and the Sun Oil Company for them to give me that price.

Q. How did you happen to sit at 25.9 rather than 26.9, 27.9, or 24.9?

A. I don't know.

Q. But they gave you that price, didn't they?

Mr. Emmerglick: Just a minute. That's putting words in the witness's mouth. I ask that be stricken.

Hearing Examiner Piper: He didn't answer the question. You don't strike counsel's question.

Objection sustained.

How did you arrive at the price of 25.9 is what he is trying to ask you.

The Witness: Super Test. I was cutting my price down with theirs.

Hearing Examiner Piper: To keep the two cents differential?

The Witness: That's right.

Mr. Emmerglick: That's all.

[fol. 138] Mr. Wilson: That's all.

* * * * * * * *

BEFORE FEDERAL TRADE COMMISSION

Council Chambers
Jacksonville City Hall
Jacksonville, Florida

February 5, 1957.

Met, pursuant to notice, at 10:00 a.m. Before Robert L. Piper, Hearing Examiner.

APPEARANCES:

Rufus E. Wilson, Esq., Attorney for the Federal Trade Commission.

Ross D. Young, Esq., Attorney for the Federal Trade Commission.

Joseph W. Henderson, Esq., Attorney for the Respondent, Sun Oil Company, 1910 Packard Bldg., Philadelphia 2, Pennsylvania.

Leonard J. Emmerglick, Esq., Attorney for the Respondent, Sun Oil Company, 1826 Jefferson Place, Washington 6, D.C.

Henry A. Frye, Esq., Attorney for the Respondent, Sun Oil Company, 1608 Walnut Street, Phila., Pa.

Cyril C. Copp, Attorney for the Respondent, Sun Oil Company, 1625 Barnett National Bank Building, Jacksonville, Florida.

[fol. 139] MAXIMILIAN DIETSHE, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

Q. Will you give the reporter your full name, please?
A. My full name?

Q. Yes, sir.

A. Maximilian Dietshe.

. . . . . .

Q. Where are you employed?

A. I am employed in Jacksonville, Florida, in the Regional Office.

Q. In what company?

A. Sun Oil Company.

Q. In what capacity, sir?

A. Regional Manager.

Q. What are your duties as Regional Manager, Mr. Dietshe?

A. My duties are to handle sales, distributive operations, personnel relations, under the direction of the general sales manager and or the vice-president in charge of sales.

Q. What territory or regions are under your control?

A. The wholesale and industrial oils, North Carolina, South Carolina, Alabama, Georgia, Florida. The gasoline, roughly an area from Savannah, Georgia, to southern part of Florida, and west to, say Valdosta and the west coast of Florida.

. . . . . .

[fol. 140] Q. How many states does the Sun Oil Company operate in Mr. Dietshe, if you know?

A. 18, parts of or whole.

Q. Do you—are you familiar enough with them to name them, or would that be too much?

A. I think I can. Do you want me to name the six New England States?

Q. Name all the states.

A. Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Ohio, Illinois, Indiana, Kentucky, Maryland, Delaware,—Maryland, Delaware,—Virginia, North Carolina, and the states I mentioned previously.

Q. Now from what point or points, Mr. Dietshe, do you obtain the gasoline for your various service stations in the areas under your control?

A. For the service stations?

Q. Yes, sir.

A. You are talking about the bulk plants?

Q. Yes, sir.

A. Tampa, Port Everglades, Jacksonville, and Sanford, Florida.

Q. Where are the distributing points located for the immediate area of Jacksonville?

A. On the St. Johns River, 21st and Talleyrand in Jacksonville.

Q. And how is that gasoline distributed from here?

A. To that plant?

Q. Yes, sir.

A. From the refinery at Marcus Hook, Pennsylvania.

Q. Now, do you have district managers working under you, Mr. Dietshe?

A. Yes.

[fol. 141] Q. How many, sir?

A. Three.

. . . . . .

Q. Will you spell that, please?

A. B-e-a-r-d-s-l-e-y. Van Scoyoc William Van S-c-o-y-o-c, in Tampa, and Martin Johnson, Port Everglades.

Q. Now, in the area under your control, Mr. Dietshe, as regional manager, what, that is, I presume, divided into subareas where you—three district managers?

A. They are divided into districts.

Q. What are those districts, sir?

A. Jacksonville District, Tampa District, and Miami District.

Q. Under what district does your, do your South Carolina stations——

A. Come under Jacksonville District.

Q. Jacksonville District.

A. Wholesale and industrial oils, only.

Q. And under whose jurisdiction are your service stations?

A. Sir?

Q. Under whose jurisdiction are the service stations?

A. We have no service stations in South Carolina.

Q. You have no service stations in South Carolina?
A. No.

. . . . . .

[fol. 142] Q. Now, how many salesmen do you have in the Jacksonville area?
A. I have none but there are five under the District Manager.
Q. I see. Well, aren't you their supervisor in reality?
A. Of the District Managers.
Q. Aren't the district Managers under your authority and control?
A. That is right.

. . . . . .

Q. Well, let me ask you this: Doesn't your District Manager consult with you on matters of policy?
A. Yes, sir.
Q. So, wouldn't it be a matter of policy if you was going to reassign a salesman from a designated area to another?
A. No.
Q. It would not be?
A. It would not be a matter of policy.
Q. Well, then am I to understand from the fact that you have five salesmen that the Jacksonville area is divided into five sub-divisions?
A. Sales areas, yes.

. . . . . .

Q. Yes.
A. General sales manager, regional manager, district manager. That's all.
Q. Well, now, where do the salesmen fit into that?
A. The salesmen work under the jurisdiction of the district manager.
[fol. 143] Q. And would you say that they are the last rung on that ladder, so to speak, of command?
A. Yes, I would say so.

. . . . . .

By Mr. Wilson:

Q. Now, as I understand, the salesmen would make reports of any events or happenings within their area to their respective district managers?

A. That's correct.

Q. Now, in turn, do your district managers then make reports to you?

A. Yes, positions, outline of normal routine of business.

Q. Now, within this Jacksonville area, Mr. Dietshe, is any one of these particular salesmen, insofar as you know assigned to what I would term "trouble shooting" activities?

A. No.

Q. Now, I believe you mentioned a moment ago, Mr. Dietshe, that Sunoco had some 300 service stations.

A. Almost 300 in the region.

Q. In your region?

A. In the region, yes.

Q. Of those 300, Mr. Dietshe, how many are company-owned and-operated?

A. Operated?

Q. Yes, sir.

A. Four at the moment. Three, generally.

Q. And how many, sir, are company-owned and-operated within Jacksonville area, Duval County?

A. Now?

[fol. 144] Q. Yes.

A. Two.

Q. Where are they located?

A. One is a training station at Atlantic and Hendricks, and the other at 35th and Main.

. . . . . .

By Mr. Wilson:

Q. Mr. Dietshe, do you recall an attorney examiner from the Federal Trade Commission calling on you?

A. Do I recall what, sir?

Q. An Attorney examiner from the Federal Trade Commission calling upon you?

A. Yes, sir.

Q. At that time do you recall giving him some figures

as to the percentage of the market of various oil companies taken from the Florida State Report?

A. No, I did not give him any information of that nature.

Q. You don't recall quoting to the attorney examiner certain figures released by the State of Florida for the month of December, 1955?

A. No, I don't recall that. It is public information.

Q. If he says that you said that, would you deny that you said it to him?

A. I wouldn't deny it, but I would say it is public information.

. . . . . .

Q. But you don't remember giving him any figures whatsoever?

[fol. 145] A. I recall telling Mr. Gravatte that I can not give him any information relating to the company's business, that he could ask any questions that he wanted answered to our Assistant Secretary and Treasurer, Mr. Joseph Wilson in Philadelphia, if he would direct his questions to him I was sure that he would get a satisfactory answer.

Q. Well, hadn't you given him this information prior to the time you made that telephone call?

A. Prior to making what, a telephone call?

Hearing Examiner Piper: He didn't say anything about a telephone call.

By Mr. Wilson:

Q. Did you or did you not make a telephone call to Philadelphia with respect to that interview?

A. Yes, sir.

Q. And didn't you give Mr. Gravatte this information prior?

A. Not to my knowledge.

Q. Not to your knowledge?

A. That is right.

. . . . . .

Q. Well, you know, do you not, Mr. Dietshe, that you gave a price adjustment to your station at 19th and Pearl on February 27th, 1955?

A. February 27, 1955? No, I was in the room yesterday——

Q. Or December 27, I am sorry.

A. That is right, yes.

Q. December 27, 1955?

A. That is right.

[fol. 146] Q. Now, at that time did you give a price adjustment to any of your other Sunoco Stations in Jacksonville?

A. No.

Q. When did you reduce the tank wagon price to your other Sunoco Stations in Jacksonville?

A. As I remember it, when certain major suppliers dropped their tankwagon market we followed suit.

Q. Now, would that be on or about February 5, 1956?

A. It may be, I would have to refer to the records.

. . . . . .

Mr. Henderson: Yes.

By Mr. Wilson:

I now show you Commission's Exhibit 3-A through V, and ask that you examine them for the purpose of more or less fixing the date at which time you gave the lower price to all of your Sunoco stations in the Duval County area.

A. Right.

Q. And start out with A and as you go through there you will notice that it is almost the same until you get to Commission's Exhibit 3-O.

(The witness examined the documents referred to.)

Q. Can you state now, Mr. Dietshe, after examining these, it was on or about February 5, 1956, that the——

A. Let me point out——

[fol. 147] Q. Yes.

A. —that you are talking about Crabtree invoices there?

Q. Yes, sir.

A. There were many other dealers in Duval County that enjoyed a price sometime around that date.

Q. Oh, yes, sir.

A. It may have been some were earlier and some were later, depending on their delivery date. In other words, I can't fix the exact date without referring to our records.

Hearing Examiner Piper: Well, about that time.

The Witness: I would say so. Within reason. Within reason.

. . . . . .

Q. Now, Mr. Dietshe, we have more or less fixed an approximate time for the so-called price war in Duval County, and I will ask you what, in your opinion, was the cause of the so-called price war?

A. A group of major suppliers dropped the price after which we followed suit.

Q. Do you know why?

A. Why they dropped the price?

Q. Yes, sir.

A. I don't know.

Q. From your information, the information obtained by you, in your position?

A. That's correct.

Q. You don't know why they dropped the price?

A. No, sir.

[fol. 148] Q. I'll now ask you this: Wasn't it because of the challenging position of the independent gasoline service stations in the area?

A. I don't know.

Q. You don't recall on the occasion of the interview with the attorney examiner, stating to the attorney examiner that was the cause of the price war?

A. No, sir. As a matter of fact,——

Mr. Henderson: You have answered the question, now. Unless it is asked you just limit yourself to the answers, Mr. Dietshe, unless there is something you want to add or explain.

By Mr. Wilson:

Q. If I told you that the attorney examiner reported that you stated that to him, would you deny that you did that?

A. Yes, I would deny it.

Q. You would deny that you told the attorney examiner that the real cause of the price war was the fact that independent gasoline stations in Jacksonville and throughout the State of Florida have an unusually large share of the market?

A. I would deny that I told him that, yes.

Q. You would deny that?

A. Yes, I would deny that.

Q. Even though he reports that you told him that you would deny it?

A. Even though he reports it, yes.

. . . . . .

[fol. 149] Q. What are the names of the companies in Duval County who constitute the major oil companies, Mr. Dietshe?

A. Major oil companies?

Q. Yes.

A. American Oil Company. Atlantic. Cities Service through Orange State. Standard of Kentucky. Gulf. Phillips. Richfield. Texas. I think there are 12 of them in number.

Q. Going back to 19th and Pearl Streets, Mr. Dietshe, do you recall when that Super Test Station there was built?

A. Some time prior to August, the end of August.

Q. In other words, would you say that it started operating sometimes around the first of September or during the latter part of August?

A. Prior to the end of August.

Q. Prior to the end of August?

A. Prior to the end of August.

Q. It started operating?

A. Yes, sir.

Q. Do you recall whether or not it built new as a filling station at that time?

A. My recollections are that it was.

Q. That it was?

A. Uh-huh (indicating the affirmative.)

Q. What was the differential in price between your station at 19th and Pearl and the Super Test Station on the day that it opened, do you know?

A. I have not the slightest idea.

Q. Well, do you know whether or not it was lower or higher than your Sunoco Station?

A. I would say that under normal conditions it would be lower.

[fol. 150] Q. Under normal conditions, how much lower would you say?

A. It varied widely.

Q. Well now, I will ask you, is there a customary spread between the price of independent gasolines and the price of *nature* gasolines?

A. Not to my knowledge. There has never been a customary spread.

Q. Isn't it generally accepted that there will be a two cent differential?

A. No, sir.

Q. Were you in close contact with the situation at 19th and Pearl Streets, Mr. Dietshe?

Mr. Henderson: What time, Mr. Examiner?

By Mr. Wilson:

Q. From on or about December 27, 1955?

A. Yes, I was in close contact from the date of this first ad which appeared.

Q. The ad, you refer to the advertisement of the Super Test Station that was used yesterday?

A. Grand opening, yes.

. . . . . .

Q. Now, you received from Mr. McLean, the operator of your station at 19th and Pearl Streets a number of requests for some relief price wise between the time the Super Test Station opened in August and December the 27th, 1955?

A. Not I personally.

Q. Had your office?

[fol. 151] A. I understand from my District Manager

that the request had been made from time to time. In Fact—I am sorry.

Q. Did your District Manager confer with you about those requests?

A. Frequently.

Q. Do you have any memoranda or notes in your files as to these requests from Mr. McLean for assistance?

A. No.

Q. Did you report the situation to your home office?

A. Yes, sir.

Q. Did you ask for advice or for instructions?

A. I related the situation as it stood, the requests and the studies that had been made, and was advised that I could grant a voluntary allowance.

Q. Well now, was that on or very close to December 27th, 1955, or had you reported it to your home office upon receiving the earlier requests?

A. No, I reported it at that time when I felt that the situation was desperate.

Mr. Henderson: Now, could we have that time fixed, Mr. Examiner? I imagine the Commission——

Mr. Wilson: That is my next question.

By Mr. Wilson:

Q. And would you say, Mr. Dietshe, that was on or about February 27, 1955—I mean December 27, 1955?

[fol. 152] A. I would say it was just before or after Christmas. Let me put it that way.

Q. Now, what arrangements did you make with Mr. McLean at the time it was decided that the situation was desperate, that you should grant him an allowance?

A. I made no arrangements. I gave instructions to the District Manager as to the voluntary allowance we could grant him.

Q. What were those instructions?

A. In effect we could grant an allowance of 1.7.

Q. And you didn't say to Mr. McLean at that time or instruct Mr. Beardsley at that time to advise Mr. McLean or to advise his salesman that was conducting the negotiations that he could only get the 1.7 unless he agreed to take

a reduction in his profit of 1.3 percent and to sell the gasoline at 3 cents under the price that was then posted?

A. Our instructions specifically stated under no circumstances are we to set retail prices for our dealers or order them to do so——

Mr. Henderson: Mr. Dietshe, would you please let the question be read and will you please answer it.

Mr. Wilson: Yes, you have not answered the question. Will you read the question?

(The reporter read the question as follows:

"Question: And you didn't say to Mr. McLean at that time or instruct Mr. Beardsley at that time to advise Mr. McLean or to advise his salesman that was conducting the [fol. 153] negotiations that he could only get the 1.7 unless he agreed to take a reduction in his profit of 1.3 percent and to sell the gasoline at 3 cents under the price that was then posted?")

A. The answer is no.

Q. You didn't have an agreement with Mr. McLean that he would reduce his profit 1.3?

A. No agreement.

Q. You heard his testimony yesterday, didn't you?

A. What is that?

Q. You heard his testimony here yesterday?

A. I thought so; yes.

Q. You heard him testify that there was such an agreement?

A. No, sir, he did not. I heard him say definitely there was not——

Mr. Henderson: Now, I object. Mr. Dietshe, don't answer when there is an objection. I object to it. There is no such testimony in the record whatsoever.

Hearing Examiner Piper: There is an objection. Do you want me to rule on it?

Mr. Wilson: Well, I thought there was more or less an argument by Counsel that there wasn't any such thing in the record.

Hearing Examiner Piper: The question has not been answered. Do you want to waive the answer?

[fol. 154] Mr. Wilson: No, sir.

Hearing Examiner Piper: All right, read the question.

(The reporter read the question as follows:

"Question: You heard him testify that there was such an agreement?" "Answer: No, sir, he did not. I heard him say definitely there was not——")

Hearing Examiner Piper: All right, go ahead. He has answered it. Counsel withdraws his objection.

By Mr. Wilson:

Q. Did you have an understanding with Mr. McLean?
A. No.
Q. Would your records indicate, Mr. Dietshe, that beginning on or about December 27, 1955, that Mr. McLean had reduced the profit that he would ordinarily make on his gallonage to 1.3 percent?
A. I can't answer that in that manner——

Mr. Emmerglick: You mean 1.3 percent?
Mr. Wilson: 1.3 cents per gallon.
The Witness: I can't answer it just that way. I would have to see the figures in order to answer that question. [fol. 155] Mr. Henderson: Well, just specifically answer the question that is asked of you. If you will read the question to him so we can get a specific answer to the specific question.

(The reporter read the question as follows:

"Question: Would your records indicate, Mr. Dietshe, that beginning on or about December 27, 1955, that Mr. McLean had reduced the profit that he would ordinarily make on his gallonage to 1.3 percent?")

A. My records don't indicate that, no.

By Mr. Wilson:

Q. Would the records in your home office indicate that?
A. I don't think so.
Q. Then, your testimony is that at no time was there any agreement or understanding with Mr. McLean that he was to cut his margin of profit by 1.3 percent?

Hearing Examiner Piper: Cents.

By Mr. Wilson:

Q. (Cont'd.) 1.3 cents per gallon in order to receive the price allowance of 1.7 cents per gallon from your company?

A. The answer was no agreement.

Q. Now, do you mean when you say the word agreement that there wasn't anything in writing?

Mr. Henderson: Well now, we will—well, all right.

[fol. 156] Q. What is your understanding of the word agreement, Mr. Dietshe?

A. Two people getting together and decide on a specific thing to do.

Q. Well, in your use of that term agreement does that necessarily mean that it must have been reduced to writing?

A. I suppose it could be put in writing, yes.

Q. But you don't necessarily limit your meaning——

A. I didn't understand it.

Q. You don't necessarily limit the meaning of the word agreement to that?

A. No.

Q. Isn't it a practice that has been followed by you, Mr. Dietshe in your area to require your Sunoco Dealers in situations such as existed out at 19th and Pearl to absorb part of this reduced price that you wish to post?

A. Will you frame that question again please?

Hearing Examiner Piper: Will you read it.

(The reporter read the question as follows:

"Question: Isn't it a practice that has been followed by you, Mr. Dietshe, in your area to require your Sunoco Dealers in situations such as existed out at 19th and Pearl to absorb part of this reduced price that you wish to post?"

A. I might say that the margin of profit varies widely, depending on the posting that the retailer decides that he wants to put at his particular station.

[fol. 157] By Mr. Wilson:

Q. Well, that still doesn't answer my question. I asked you whether or not it was the policy?

. . . . . .

A. We don't set policies. We don't set retail prices.

Q. What was the margin of profit that Mr. McLean was operating under at the station at 19th and Pearl?

. . . . . .

The Witness: I can't say specifically.

By Mr. Wilson:

Q. Who in your organization would know?

A. I don't think anybody in our organization would know without examining his books.

Q. You mean the Sun Oil Company has no records as to the——

A. No.

Q. As to the margin of profit?

A. We know only at what price we sell our products to the dealers.

Q. You just testified, Mr. Dietshe, that some of these service stations had various margins of profit. You mean by that they determine their own margin of profit?

A. Yes.

Q. By the——

A. Yes.

Q. —proposed price?

A. Yes, that's right, as you find today when you take a trip.

[fol. 158] Hearing Examiner Piper: Do I understand from your testimony that different Sun Oil Stations around Jacksonville charge different prices?

The Witness: Yes.

Hearing Examiner Piper: For the same product?

The Witness: That's right.

Hearing Examiner Piper: Right now, for example?

The Witness: Right now.

Hearing Examiner Piper: Is that true, normally?

The Witness: I would say generally speaking that takes place throughout the state. Of all companies.

Hearing Examiner Piper: My question was directed to Jacksonville.

The Witness: Jacksonville, yes, sir.

[fol. 159] By Mr. Wilson:

Q. When these service stations come up—become vacant—Mr. Dietshe, and you have applicants, don't you say to these applicants that they can make up any cents per given profit in that station?

A. We give them averages as an estimate of the possible profit.

Q. Well, what are your averages?

A. They vary widely.

Q. Estimate.

A. They vary widely.

Q. In Duval County?

A. They vary widely.

Q. What are they? Let them vary widely. Let's have them.

A. It might be as low as three and a half, as high as five and a half. Might be six cents. We can only point out what the prevailing competition is to a dealer.

Q. Have you ever asked a Sunoco operator in your territory, Mr. Dietshe, to absorb through a reduction in the profits that would ordinarily ensue to him in order to obtain a price adjustment and to sell Sun Oil Company gasoline at a certain figure?

A. No.

Q. Have you ever decided to reduce the price, the posted price, in your service stations, by two cents, three cents, or something like that and require your operators to absorb part of that reduction?

A. No.

. . . . . .

Q. What, if any, report did you make to your home office, Mr. Dietshe, respecting the allowance you gave Mr. McLean on December 27, 1955?

[fol. 160] A. I related what the going conditions were, pointed out that requests from the dealer was probably

the last we would get, because otherwise he would go broke, that he was a young man that invested his capital, worked 60 to 70 hours a week, was not only losing a living but his capital as well, through no fault at all of his own, and made the recommendation that an adjustment should be made, which was granted.

Q. Is that report available?

A. Telephone, sir.

Q. It was by telephone?

A. Yes, sir.

Q. To whom did you make that report?

A. General sales manager of the company.

Q. Is that Mr. Wilson?

A. Mr. Wright.

Q. Mr. Willard Wright?

A. Mr. Willard Wright.

Q. Mr. Wright's here today, isn't he?

A. Yes, sir.

Hearing Examiner Piper: Off the record.

(Discussion off the record.)

Hearing Examiner Piper: Off the record.

By Mr. Wilson:

Q. Now, on the occasion that you gave this—I mean, some time after you gave this allowance to Mr. McLean, didn't you have complaints from some of your other Sunoco dealers about that?

[fol. 161] A. No, sir, not to my knowledge.

Q. Didn't any of your salesmen or your district manager report receiving such complaints?

A. Not until February.

Q. Not until February?

A. Some time in February.

Q. You don't recall Mr. Bill Crabtree saying anything to you?

A. Mr. Bill Crabtree never talked to me about the price situation in the year or two years that he was at the station.

Q. Did he try to and you wouldn't talk to him?

A. That is not true.

Q. Did you talk to Mr. McClung?

A. Not until after he closed his station.

Q. Do you know when that was?

A. Offhand, I don't, but I think it was the end of January, first of February; I would have to refer back to my records to find out.

Q. But you had—You had no records, nor do you have any knowledge of having received any complaints from your other Sunoco dealers here respecting this allowance you gave to Mr. McLean until around the middle of February?

A. I couldn't tell you whether it was the middle or beginning of February. I don't know.

Q. Would you say at the time the general price war started?

A. It was in that area.

Q. In that area?

A. Yes.

Q. Super Test has more or less been a thorn in your side here in your operation in Florida for some time, has it not, Mr. Dietshe?

A. I don't know what you mean by that.

[fol. 162] Q. An irritant?

A. No, I wouldn't say so.

. . . . . .

Q. You were not disturbed or any way irritated, shall we say, by the fact that Mr. Hughey built this station at 19th and Pearl Streets across from your station?

A. No. I am not irritated at competition in the least.

Q. It is your testimony that the building of this new Super Test Station in August at 19th and Pearl had nothing to do with the lower price granted to Mr. McLean at that station?

A. Say that once more please.

Hearing Examiner Piper: Read it please.

(The reporter read the question as follows:

"Question: It is your testimony that the building of this new Super Test Station in August at 19th and Pearl had nothing to do with the lower price granted to Mr. McLean at that station?")

Mr. Wilson: Strike that. I don't mean that.

By Mr. Wilson:

Q. I will now ask you Mr. Dietshe, whether or not there didn't come a time in Jacksonville when the prices, the posted prices, at the stations leveled off at a price of 20.9 for the majors and 19.9 for the independents?

[fol. 163] A. I can't tell you without referring to the record.

* * * * * * *

JESSE P. MCCLUNG, was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

* * * * * * *

Q. Now, what is your present occupation?

A. Manager of W. W. Mack Company, Variety and 10. 5c and $1.00 store.

Q. Now, prior to your assuming this occupation where were you employed?

A. Well, I was at Fernadina for a while, but I guess you want prior to that. I was only up there for——

Q. What were you doing in Fernandina?

A. I was in the same business.

Q. Now, prior to that, Mr. McClung, where were you located?

A. I operated a Sunoco Oil Station.

Q. Where?

A. 35th and Main.

* * * * * * *

Q. What is the loction of that station in relation to 19th and Pearl?

[fol. 164] A. Well, let's see. It's two blocks over and

it would be about 10—12 blocks down, I believe. Approximately.

. . . . . .

Q. Now, did you keep records, Mr. McClung, of your day by day sales?

A. Yes, sir.

Q. Did you bring those records with you?

A. Yes, sir.

. . . . . .

Q. Now, Mr. McClung, going back to my previous question, will you state for the record the number of gallons of gasoline that you sold for the month of September, 1955?

A. Well, I have it all here together starting with the 28th of August. I didn't make a separate record for that month. Well, it would include three days in August, but it is 11,534.8.

Q. Now, would you do the same, or would you repeat that for October '55?

A. 10,278.6.

Q. The same for November, 1955?

A. 10,153.2.

Q. Now, the figures for December, 1955?

A. 11,121.3.

Q. Now, would you give us the gallonage figures for January, 1956?

A. Well, that isn't complete. I am going to have to figure it because I wasn't there a full month and never even closed it out, but it will only take me just a minute. I have them day by day here. I have got 4,738.9.

. . . . . .

[fol. 165] The Witness: Along about, the 13th or 14th, they refused to sell me any more gas, so I was operating just whenever I was down there three or four hours a day, because I knew that I was going to run out of gas and wouldn't have any more, so the lease ran on and I didn't register it every day and didn't check every day, and it is very scattered.

Mr. Henderson: My objection is, Mr. Examiner, as to the

correctness of these records as being a record of the day by day sales.

Hearing Examiner Piper: Well, as I understand it it shows the total gallonage that he sold during the month of January until he closed up, and there is some question as to when that was, but you say it was around the 27th?

The Witness: Sir, I don't know whether I have got those figures or not, because——

Hearing Examiner Piper: What figures?

The Witness: I mean the exact date that I left that station. I don't believe that I have it because I was just hanging on there. In other words, I didn't have no gas and they wouldn t sell it to me, so I just "piddled" around.

[fol. 166] Hearing Examiner Piper: Well, what is your best recollection as to when you stopped doing business there? You said before.

The Witness: Do I have those?

Hearing Examiner Piper: I am not asking you for records now. I am asking you for your best recollection.

The Witness: Well, *the records* show there the 26th. In other words, that is the last date that I have the reading there, the 26th of January.

Hearing Examiner Piper: What happened then, you just shut up?

The Witness: I had nothing to sell. I was just out of gas.

By Mr. Wilson:

Q. Mr. McClung,——

Mr. Wilson: This is in connection with your objection, Mr. Henderson.

Mr. Henderson: Yes, I asked the general question if these were day by day entries on here and as I noticed in the beginning there were dates on the first page.

Isn't that correct, Mr. McClung?

[fol. 167] The Witness: Yes, sir.

Mr. Henderson: But after that time——

The Witness: Up until January, I think but after that——

Mr. Henderson: Well, you say these are then daily sales up until what, the first of January?

The Witness: No, up until it gives you the skip there.

Mr. Henderson: Up until the last item on the 15th of January?

The Witness: It wasn't daily up to the last. It was up to the 14th.

Mr. Henderson: They were daily up to the 14th and entered by you?

The Witness: Yes, sir.

Mr. Henderson: Well, Mr. Examiner, I will then object to the records as not being an exact record and that we are not bound by the testimony in the record except insofar as the witness is able to testify that those do represent the daily sales entered by him on the record.

[fol. 168] Hearing Examiner Piper: He testified that he didn't sell every day or didn't enter it every day after the 14th.

Mr. Henderson: That is right, that is my objection.

Hearing Examiner Piper: He made spasmodic sales but it is still on record of what he sold.

Mr. Henderson: That is right, but note my objection to the using of that record for the correctness of it because I think it does not comply with the requirements as to the type of records that could be used because it is inaccurate in my opinion from then on. It may be perfectly accurate but—may I just ask this question:

Up to the 14th or 15th, that is a daily record made by you?

The Witness: Up to the 14th it shows here.

Mr. Henderson: And from there on you have put down items that represent your sales, is that correct?

The Witness: That is right.

Mr. Henderson: But the dates of them you do not know?

[fol. 169] The Witness: Well, it is not every day, no, sir.

Mr. Henderson: No, but I mean the exact time you left the station you do not know?

The Witness: From these records I can't be sure.

Mr. Henderson: Well, I just—all right, I think whatever the records shows what they were will show it without my objection, Mr. Examiner.

Hearing Examiner Piper: Well, I had not—yes, I had ruled.

Mr. Henderson: Yes. You see, this came up as a result of his answering a specific question after you had ruled.

Hearing Examiner Piper: Are you now objecting?
Mr. Henderson: No, I don't object, just to clarify.

By Mr. Wilson:

Q. Mr. McClung, your records for January do reflect the total number of gallons that you sold in that month—perhaps they don't do it day by day—but they do reflect the total amount sold?

A. That is right.

[fol. 170] Q. And you gave us that figure, did you not, that is 4000?

A. 4,738.9.

Q. And they reflect a daily sales all through your records up to the 14th day of January?

A. That is right.

Q. Now, Mr. McClung, would you take your records, which you had before and is now in evidence as Commission's Exhibit Number 22A through 22-F, and starting with the third week in December, give us a daily report of your gasoline sales?

A. You want that daily?

Q. Up to the end of December, 1955.

A. The third week. You mean starting from the 22nd?

Q. Yes, that is close enough.

A. Monday, the 22nd, 295.6. Tuesday, the 23rd, 15.5; Wednesday the 24th, 448.8; It was closed the 25th, which was Christmas; the 26th, 369.6; the 27th, 492.9; the 28th, 332.9; the 29th, 275.2; the 30th, 276.5; the 31st, 302.0.

Q. Now, give us the first week in January, 1956, by days, Mr. McClung?

A. On the 1st, the record shows it was on Monday, I guess that is right. 225.0.

Hearing Examiner Piper: That is the first?
The Witness: Yes, sir.
Hearing Examiner Piper: New Years Day?

[fol. 171] The Witness: Yes, sir.

A. (Continued) And the 2nd, 297.1; the 3rd, 200.0; the 4th, 113.8; the 5th, 222.1; the 6th, 211.1; the 7th, 238.1. That is the first week.

. . . . . .

Q. Well, how do you account, Mr. McClung, for your decrease in gallonage during the latter part of December and the first part of January?

A. Well, it was simple. The Pearl Street station was taking the business, 19th and Pearl.

Q. Was that a Sunoco Station?

A. That is right, but they were selling our own grade of gasoline three cents cheaper than we were.

Hearing Examiner Piper: What was your price?

The Witness: 28.9.

By Mr. Wilson:

Q. And what was the price that gasoline was selling at, at the Sunoco Station at 19th and Pearl?

A. 25.9, I believe.

Q. Now, where did your customers come from, Mr. McClung, in relation to the position of your station?

A. Well, that particular location out there they all had to come from in back of the station because there was nothing to pull much from the front of it which brought in all that area in behind between Main and Pearl and [fol. 172] then on over, and most of that traffic went to town down Pearl Street, which I always did myself, and, of course, if you are a Sunoco Oil Customer, anyway, you can buy it three cents a gallon cheaper, you are certainly not going to trade with me.

Mr. Henderson: Now, I ask that the end of that answer be stricken from the record. It is simply a conclusion.

Hearing Examiner Piper: The motion is granted beginning with "of course."

Mr. Henderson: Right, sir.

By Mr. Wilson:

Q. Did you have regular customers at your station?

A. Certainly, yes.

Q. What if any regular customers did you lose during the time, if you know?

. . . . . .

A. I don't believe I can answer that, Mr. Wilcox, because to definitely point out——

Hearing Examiner Piper: Is his name is Wilson.

A. Wilson—point out one definite customer's name and address, I can not answer that but I think the gallonage would speak for itself. In other words, I lost some of them.

[fol. 173] Mr. Henderson: I move that that be stricken from the record, if Your Honor pleases as not being responsive as far as the tail end again.

Hearing Examiner Piper: Motion denied.

By Mr. Wilson:

Q. Now, I believe you testified Mr. McClung that—will strike that.

Hearing Examiner Piper: I would like to clear up something before you go ahead Mr. Wilson. You said before something about your customers came from in back of your station and not in front?

The Witness: That is right.

Hearing Examiner Piper: Just what do you mean by that? What do you call in back of your station?

The Witness: Which way is north? Is that north (indicating)?

Hearing Examiner Piper: Main Street runs north.

The Witness: Well, that is West. Back of the station, west of it.

[fol. 174] Hearing Examiner Piper: The station faces east?

The Witness: That is right.

Hearing Examiner Piper: On Main Street?

The Witness: It faced—I am all turned around. It is on the left of Main going out.

Hearing Examiner Piper: That would be facing east, if Main runs north and south?

The Witness: It would be west then.

Hearing Examiner Piper: When the customers came from in back of you, you mean the area west of you?

The Witness: That is right.

Hearing Examiner Piper: Which would be toward Pearl Street?

The Witness: (The witness nodded in the affirmative.)

Hearing Examiner Piper: And you were on the corner?

[fol. 175] The Witness: The corner of 35th and Main.

Hearing Examiner Piper: On the lefthand side going out were you on the south or north corner?

The Witness: South corner.

Hearing Examiner Piper: In other words, you were on the south west corner of 35th and Main?

The Witness: That is right.

Hearing Examiner Piper: You indicated before that there was some reason why they couldn't come from the other side or wouldn't naturally come. What was that?

The Witness: Well, the population is not much on the other side on account of the cemetery and the railroad tracks and that sort of thing. There is not too many people lives in front of the station.

Hearing Examiner Piper: I see. All right, I wanted to get that straightened out. Go ahead.

By Mr. Wilson:

Q. Now, you testified, Mr. McClung, that the Sunoco station at 19th and Pearl was selling gasoline at 25.9, I be- [fol. 176] lieve you stated. That was some three cents cheaper than your posted price?

A. Right.

Q. Now, did there come a time, Mr. McClung, when you went up to see Mr. McLean at 19th and Pearl?

A. Yes, sir.

Q. And who went with you?

A. Mr. Crabtree.

Q. Now, on that occasion did you say anything to Mr. McLean about this situation?

Mr. Henderson: Now, I object to this as being hearsay as far as Mr. McClung and Mr. Crabtree and Mr. McLean are concerned, and has nothing to do with the Sun Oil Company. None of them any agents, representatives, or otherwise, of the Sun Oil Company.

Hearing Examiner Piper: What could be the relevancy of what he said to Mr. McLean?

Mr. Wilson: What could be?

Hearing Examiner Piper: Yes.

Mr. Wilson: What could be developed?

Hearing Examiner Piper: What could be the relevancy.

[fol. 177] Mr. Wilson: I would like to show that, if Your Honor please.

Hearing Examiner Piper: All right, I'll hear it, but subject to its objections.

The Witness: Would you repeat that question, please?

Hearing Examiner Piper: Let's fix the time, if we can. Date, I mean.

(The reporter read the question as follows:

"Question: Now, on that occasion did you say anything to Mr. McLean about this situation?")

Mr. Henderson: Read the question before that.

(The reporter read the question as follows:

"Question: And who went with you? Answer: Mr. Crabtree.")

Mr. Wilson: We will interpose this question and strike the other one. What time would you say that was, Mr. McClung?

A. It was some time in the first part of January, but the exact date, I don't know.

Q. And you had a conversation with Mr. McLean at that time?

A. Yes, sir.

[fol. 178] Mr. Henderson: My objection continues to all this line of testimony, Mr. Examiner.

By Mr Wilson:

Q. Now, what, if anything—let me—what reason, if any, did Mr. McLean give you and Mr. Crabtree as foreselling Sunoco gasoline three cents cheaper that you were selling?

A. Well, he—I don't know as he gave a definite reason. He said that competition across the street was hurting him, always had hurt him, and they finally gave him a break on it.

Q. Did he say how much that break was?

A. I think he relinquished about a cent and a quarter of his profit and Sunoco gave him a half cent. I'm not

sure of the exact figures, but both gave up some of their profit in order to maintain the 25.9 price.

Q. At that particular time did Mr. McLean say anything concrete to you, or show you anything concrete from the Sun Oil Company as to the price he was getting?

A. He very definitely did. He gave us an invoice We asked him how much break Sun Oil was giving and he gave us an invoice.

Q. And this invoice indicated the allowance on there?

A. That's right.

Q. Did you take that invoice with you, Mr. McClung?

A. Yes, sir. Are you looking for that invoice, Mr. Wilson? We still have it if you want it. I mean, the original of it.

[fol. 179] Q. The original?

A. Yes.

. . . . . .

Mr. Wilson: No, sir.

Mr. Henderson: I think it does answer the question, Mr. Examiner; it may not be satisfactory to counsel, but——

The Witness: The only reason that he gave, of course, was that the competition across the street, but there was nothing new about that. It had always been there.

By Mr. Wilson:

Q. Did he relate to you and Mr. Crabtree the circumstances under which the Sun Oil Company allowed the 1.7 allowance?

Mr. Henderson: Now, Mr. Examiner, I object. This is about the third time he has asked the same question and it is very leading, suggesting the answer.

The Witness: It was——

Mr. Henderson: Wait a minute, Mr. McClung.

Hearing Examiner Piper: These objections have nothing to do with you. It it a legal question..

[fol. 180] Mr. Henderson: He's suggesting to him what Mr. McClung said. He has already recalled—I object.

Hearing Examiner Piper: Objection overruled. You may answer.

The Witness: They gave us that. Gave it to him to Maintain the 25.9 price.

Hearing Examiner Piper: That wasn't the question. The question was, what did Mr. McLean say was the reason for getting that allowance.

The Witness: Doesn't that still answer——

Hearing Examiner Piper: That would if he, that's what he said.

Mr. Henderson: He said before he was very vague about it and referred to competition across the street.

Mr. Wilson: He said he was very vague about it, Mr. McLean.

Hearing Examiner Piper: No, Mr. McClung.

Mr. Wilson: He was mixed up on the question, sir.

[fol. 181] Hearing Examiner Piper: Didn't he say before that Mr. McLean asked him about the lower price and why he——

Mr. Wilson: He was rather vague about it.

Hearing Examiner Piper: And all he said was the competition across the street.

Mr. Wilson: I thought the question matter was why were they selling gasoline at 25.9?

Hearing Examiner Piper: Go ahead, I'm not sure I understand what you are talking about yourself.

Mr. Wilson: The witness was beginning to testify as to the circumstances under which he received the 1.7 cent allowance.

Hearing Examiner Piper: He didn't receive any such allowance.

Mr. Wilson: Mr. McLean did receive such an allowance. It's in the record.

Hearing Examiner Piper: You said Mr. McClung.

[fol. 182] Mr. Wilson: The question was what Mr. McLean said.

Hearing Examiner Piper: Give me that last question and answer.

(The reporter read the question as follows:

"Question: Did he relate to you and Mr. Crabtree the circumstances under which the Sun Oil Company allowed the 1.7 allowance? Answer: They gave up that, gave it to him to maintain the 25.9 price.")

Hearing Examiner Piper: All right. Go ahead.

By Mr. Wilson:

Q. How was he to be enabled to maintain the 25.9 price, Mr. McClung, by the granting of a 1.7 cent allowance, if you know?

A. Well, in cutting down in his profit.

Q. Is that——

Mr. Henderson: You have been asked if you know. Do you know?

The Witness: I mean—I don't get the question.

Mr. Wilson: I'm asking him—Your Honor, please, Mr. Henderson has interrupted several times, not by way of objection but by way of advising the witness how to answer.

[fol. 183] Hearing Examiner Piper: I think that's right, Mr. Henderson.

Mr. Henderson: All right, sir.

Hearing Examiner Piper: You should not interfere. If you have an objection to the question state it, but don't issue directions to the witness. I'll direct the witness. If you have any comments address them to me.

Mr. Henderson: Mr. Examiner, I now address this comment to you.

Hearing Examiner Piper: All right, sir.

Mr. Henderson: We would like the answer of the witness of his own knowledge.

Hearing Examiner Piper: We always want that.

Mr. Wilson: We always want that, and I will ask it.

By Mr. Wilson:

Q. Did Mr. McLean give you the reasons as to the circumstances under which he was given this allowance? Didn't he state to you and Mr. Crabtree——

Mr. Henderson: I object——

Q. At the time——

[fol. 184] Mr. Henderson: I object to this as repetitious. We have had it three or four times, the same question had been framed a little different and I do object.

Mr. Wilson: I respectfully state on the record to Mr. Henderson, the question hasn't been answered to my satisfaction, and so long as it has not been and until you re-

quire me to desist I'm going to continue to ask the questions.

Hearing Examiner Piper: I'm not satisfied with the answers I've heard. I will overrule the objections.

I'm not clear what the witness is saying. Will you read him this last question, now?

(The reporter read the question as follows:

"Did Mr. McClung give you the reasons for the circumstances under which he was given this allowance? Didn't he state to you and Mr. Crabtree——")

Mr. Wilson: Strike that.

By Mr. Wilson:

Q. Mr. McClung, when you and Mr. Crabtree went up to visit Mr. McLean he advised you at that time, did he not, that he was receiving a 1.7 cent per gallon allowance, and gave you a photostat copy indicating that?

A. That's right.

[fol. 185] Q. Now, your testimony was heretofore that he stated at that time that it was to enable him to sell gasoline at his station at 25.9?

A. That's right.

Q. Now, just a minute. You also testified that when I asked you how that would account for——

Hearing Examiner Piper: We know what you testified. Are you trying to repeat now all he testified?

Mr. Wilson: If your Honor please, this witness is a nervous witness. He is confused.

Hearing Examiner Piper: He doesn't impress me as nervous. To bring him back to the question and get him to answer you are paraphrasing his testimony in a way I don't necessarily agree he said. You are leading him.

Mr. Wilson: I'm sorry.

Hearing Examiner Piper: Are you nervous?

The Witness: I don't understand the question.

Hearing Examiner Piper: That's not my question. Are you nervous?

The Witness: No, sir, not especially.

[fol. 186] Hearing Examiner Piper: You don't impress

me as being nervous. Go ahead. I want the witness to testify, Mr. Wilson, not you.

Mr. Wilson: I don't want to testify.

Hearing Examiner Piper: That's what you are doing right now. Putting in the witness's mouth words you want him to say. That's what——

Mr. Wilson: Wasn't I repeating his testimony?

Hearing Examiner Piper: When you repeat a person's testimony I don't give it much weight.

Mr. Wilson: No, sir I——

Hearing Examiner Piper: You were paraphrasing it in a way I don't think he exactly has testified.

By Mr. Wilson:

Q. Did Mr. McClean say to you, both you and Mr. Crabtree, on that occasion that in order to get the 1.7 allowance he had been required by the Company to absorb or reduce his margin of profit by 1.3 cents?

Mr. Henderson: Now, I object to that, Your Honor. It's a leading question, suggesting the answer.

[fol. 187] Hearing Examiner Piper: Objection sustained. Don't answer it. When I sustain the objection you don't answer it. I'll tell you when to answer.

By Mr. Wilson:

Q. What, if anything, did Mr. McClean say to you and Mr. Crabtree?

A. Well, they gave him——

Hearing Examiner Piper: Are you through with your question?

Mr. Wilson: Yes.

Hearing Examiner Piper: Go ahead.

The Witness: They gave him this reduction to sell this gasoline at 25.9 to meet competition across the street.

By Mr. Wilson:

Q. Now, they only gave him what?

A. A cent and seven-eights.

Q. Seven-tenths?

A. Seven-eighths I think.

Q. Seven-eighths?

A. Umm-huh. (Indicating the affirmative.)

Q. One and seven-eighths?

A. 1.7 Seven-ten.

Q. Now, 1.7 from three cents is what, Mr. McClung?

[fol. 188] A. That's 1—One and three-tenths., isn't it?

Q. Now, did Mr. McLean say anything to you and Mr. Crabtree about the balance of three cents?

A. Very definitely. He was taking it out of his profit.

Q. Did he say that Sun Oil Company required him to do that?

Mr. Henderson: Mr. Examiner, for the record we enter our objection, and further that he is endeavoring to impeach his own witness. The testimony is entirely contrary to the testimony given by Mr. McLean who was the Government's own witness yesterday in this case, and I object to it.

Hearing Examiner Piper: Read the question.

(The reporter read the question as follows:

"Question: Did he say that Sun Oil Company required him to do that?")

Hearing Examiner Piper: What was the objection?

(The reporter read the objection as follows:

"For the record we enter our objection, and further that he is endeavoring to impeach his own witness.")

Hearing Examiner Piper: Further?

[fol. 189] Mr. Henderson: It is leading.

Hearing Examiner Piper: Sustained.

Mr. Wilson: On the ground that it is leading, Your Honor please?

Hearing Examiner Piper: Yes.

By Mr. Wilson:

Q. What, if anything else, did Mr. McLean say to you on that occasion, Mr. McClung?

A. He was very dissatisfied about it. He was selling a lot of gasoline but wasn't making a lot of money out of it.

Q. Did he tell you why?

A. Certainly. On account of the 25.9 price he had to maintain.

Q. Did he indicate to you that the profits were, had been reduced.

A. Very much. Very sharply.

By Mr. Wilson:

Q. On that occasion, Mr. McClung, did Mr. McLean indicate to you whether he was satisfied or dissatisfied with the arrangements under which the allowance of 1.7 had been given?

Mr. Henderson: I again object, Your Honor. I do not see why we do not have the question to adduce what hap- [fol. 190] pened rather than suggesting what happened. It is very leading.

Hearing Examiner Piper: Well, it is leading all right, but I think it is an attempt to—it doesn't suggest the answer. It could be either one and the witness seems to have exhausted his present recollection of the incident, so I will overrule the objection at this point.

A. He wasn't satisfied. He didn't like it. He was doing a lot of work and not getting anything for it.

By Mr. Wilson:

Q. And that is what he said?

Hearing Examiner Piper: You mean he was not making much profit?

The Witness: (Nodded in the affirmative.)

By Mr. Wilson:

Q. Now, after your visit with Mr. McLean, did you have an occasion to say anything to the Sun Oil Company or to the officials of the Sun Oil Company about your situation?

A. Yes, sir.

Q. What if anything did they say to you?

A. Well, Mr. Beardsley told me once or twice he hoped it wouldn't last long. I mean that was—but he knew about my situation and knew how critical it was.

Q. Now, have you—I believe you have indicated already, [fol. 191] Mr. McClung, and correct me if I am wrong, that you went out of business sometime in January of 1956?

A. That is right, sir.

Q. Now, what if anything were your reasons for discontinuing your relationship with Sun Oil Company?

A. Well, I had $500 in cash and I called them up and asked them to sell me that much gasoline and they refused to do it and there wasn't anything else to do. I closed up and that was all, that was all of the money that I had.

Hearing Examiner Piper: Why did they refuse to sell it?

The Witness: A lesser amount of gasoline than they wanted to sell.

Hearing Examiner Piper: That is why you added that you had $500 in cash?

The Witness: That is right.

Hearing Examiner Piper: And they sell only a certain amount?

The Witness: That is right.

Hearing Examiner Piper: And that wasn't enough money?

[fol. 192] The Witness: That is right.

By Mr. Wilson:

Q. During the time that you operated this station, Mr. McClung, how did you arrive at the prices which you posted?

A. Well, that was the standard price all over Jacksonville.

Q. Were you following any particular stations?

A. Yes, sir. The Sunoco stations and every other major oil company.

Q. What would happen, if you know, if you had reduced the price at your station two cents without any contact with the Sun Oil Company?

Mr. Henderson: I object to that, sir.

Hearing Examiner Piper: What is your basis?

Mr. Henderson: No basis here to show the fact that Sun Oil Company had anything to do with the price at which they posted the gasoline as is in his question.

Hearing Examiner Piper: He changed it and said with any contact. Maybe you better read it back.

(Question read as follows:

"Q. What would happen, if you know, if you had, reduced the price at your station two cents without any contact with the Sun Oil Company?")

[fol. 193] Mr. Henderson: Well, I think it is entirely speculative as to what would happen.

Hearing Examiner Piper: Well, it might well be, but I can't tell until I hear the answer. Objection overruled.

A. Well personally, I don't know. It just isn't done. Personally, I don't know what would happen.

Hearing Examiner Piper: That is what usually happens after a long discussion about an objection and the witness usually says he doesn't know, or frequently I should say that happened.

Do I understand you to testify that all of the prices around Jacksonville were the same?

The Witness: All major oil company, yes.

Hearing Examiner Piper: Well, Sun Oil Company only carries one grade of gasoline, doesn't it? Regular?

The Witness: Yes, sir.

Hearing Examiner Piper: In other words, Standard, and Shell, and Texaco, and so forth, their regular gas was selling at 28.9?

The Witness: That is right.

[fol. 194] Hearing Examiner Piper: How would you know the prices all around town?

The Witness: Well, they are posted all over town.

Hearing Examiner Piper: At the filling stations, you mean?

The Witness: That is right.

Hearing Examiner Piper: Nobody advised you of that fact, it was just your own knowledge?

The Witness: That is right, just an accepted fact. It is the same every place.

By Mr. Wilson:

Q. What was your margin of profit, Mr. McClung, to your station?

Mr. Henderson: I object to that as immaterial.

Hearing Examiner Piper: I will be glad to hear your comments. I don't quite see the relevancy.

Mr. Wilson: Well, if you recall, Mr. Dietshe testified that the profit margin changed with every station operator and they could then sell their gasoline for as much over [fol. 195] their tank wagon price as they wanted to, which I would be anxious to know what were the margins of profit of some of the Sun Oil Company operators, that they enjoyed. I think we would find that there would be very little variation, if any.

Hearing Examiner: Well, I think that record shows that his was different than Mr. McLeans. I already figured out what his margin of profit was based on the invoice and the testimony as to what price he was selling gas at. Now, unless he got a different price prior to the 1.7—well, it might be relevant. The record already shows what McLean's margin was. I will overrule the objection, but I don't exactly see the relevancy of it, but it may be relevant.

A. The exact percent, if you will give me that invoice I will figure it out.

It is a half cent or something like that.

Mr. Wilson: I will withdraw it. We do have the invoices and the records.

Hearing Examiner Piper: Well, prior to the time that Mr. McLean reduced that price, his price, did he pay the same tank wagon price that you did?

The Witness: Yes, that is right.

Hearing Examiner Piper: And you were selling it at 28.9?

[fol. 196] The Witness: Yes, sir.

Hearing Examiner Piper: And everybody was selling it, according to your testimony?

The Witness: That is right.

Hearing Examiner Piper: And so your margin of profit was the same?

The Witness: Yes, sir.

. . . . . .

By Mr. Wilson:

Q. Mr. McClung, during the time that you operated this Sunoco Station on Main Street, did you have an occasion to observe the other posted prices of Sunoco Stations in Jacksonville?

A. Well, twice a day I came by one to three of them going back and forth to work.

Q. Were the posted prices on those stations different, higher or lower than yours?

A. The same.

Q. The same?

A. Yes.

Q. In your business, you would have known whether or not a Sunoco Station in Duval County could have posted a higher or lower price than you?

A. I wouldn't say that, not in Duval County, no, sir. [fol. 197] Q. In the City of Jacksonville, would you have known?

A. Not until one of my customers would have told me, like they did in the Pearl Street business with the exception of those three stations that I drive by.

. . . . . .

Cross-examination.

By Mr. Henderson:

Q. Mr. McClung, I show you what has been introduced in evidence as Exhibit 17, which is a letter from you dated January 10, 1956 to the Sun Oil Company, being a notice of a termination. That is your letter? Is it not?

A. Yes, sir.

Q. And, as of that date the 10th of January 1956 you gave a Notice of Termination of your Real Estate Lease as well as your Dealer's Agreement, both dated August 11, 1955, to take effect on February 22, 1956?

A. Right, sir.

Q. And, that would be six months after you started, would it not, in August 1955?

A. Yes, sir.

Q. Do you remember Mr. Brooks as a salesman?

A. Yes, sir.

Q. Will you stand up, Mr. Brooks? Is he here?

A. Yes, sir.

Q. That is Mr. Brooks standing up? (Indicating.)

A. Yes, sir.

Q. Do you remember his coming to your station to get some records off of your books?

A. (The witness nodded his head negatively.)

[fol. 198] Q. At any time?

A. No, sir.

Q. Did you ever display any of your records to him at any time?

A. Mr. Brooks?

Q. Talk up so we can hear you.

A. I don't remember.

Q. Would you deny it?

A. I think so.

Q. In other words, you deny that you ever had your books available to Mr. Brooks to take any gallonage or any other items off of it?

A. Yes, sir.

Q. And did he at any time call upon you?

A. Why, yes, he called upon me.

Q. And about what period of time?

A. Now, I don't know exactly, but he taken over awfully late. He wasn't there about two or three weeks after I left.

Q. Now, the documents which I have before me, which are marked Exhibit 22 from A through F, represent your daily records. Where is the balance of this book?

A. Where is the balance of the book? It's at home.

Q. At home?

A. Yes, sir.

Q. And would it be too much trouble to you make the balance of that book available?

A. I don't see any purpose in it. That's the gallonage. That's what they wanted.

Q. I have asked you a question, sir. Either say it——

Mr. Wilson: If Your Honor please, I think Counsel should state the reasons why he would like to have the balance [fol. 199] of that book, if it is pertinent and relevant to these proceedings.

Hearing Examiner Piper: That accounting will have to be made to me. He just asked the witness if it would be possible to have it available. The reason why is beside the point at this point. In other words, it is available and could it be made available?

The Witness: Oh, yes, sir, it could be.

By Mr. Henderson:

Q. Will you make it available?

A. If you will state a reason for wanting it.

Q. My reason for wanting it is this: I would like to be certain that the book is accurate. Now, is that sufficient reason for you to produce it or not?

A. Why, yes, but there's nothing else in this book that——

Mr. Wilson: Your Honor please, may I ask the witness a question with respect to the inquiry?

Hearing Examiner Piper: Yes.

Mr. Wilson: Are there any other notations in that book pertaining to the conduct of your business?

The Witness: The payroll and equipment record. I believe that's all.

[fol. 200] Hearing Examiner Piper: What kind of a book was it?

The Witness: It's a big package deal, complete records of the station. Sun Oil's own book.

Hearing Examiner Piper: Bound book?

The Witness: Yes, sir, wire bound, like you see before you.

By Mr. Henderson:

Q. Have there been any changes in this list sheets since the items were originally put on there?

A. Not that I know of, sir.

Q. Would you know if there had been any?

A. I think so. They have never been out of my possession.

Q. And you were the only person who put the records in?

A. That's right.

Q. May I just call your attention to an item here. Has there been any erasure on the item of December 29, which says 275.2 gallons?—Was that at one time 375.2 gallons?

A. Not that I know of, no, sir.

Q. Will you look at it closely and see if there have been any erasures?

A. There have been erasures, yes, sir. You will find erasures a lot of places. I'm not a very neat bookkeeper.

Q. Is that your explanation?

A. Sir, may I ask how these questions are—what's the purpose of the question?

[fol. 201] Hearing Examiner Piper: The purpose of the question is to establish—it is cross-examination. The purpose of cross examination is to establish the reliability of your testimony on direct. Now, he is checking these records you have produced. He has no way of knowing whether or not they are reliable or whether or not they have been altered. He calls your attention to what appears might be an erasure.

The Witness: It probably is.

Hearing Examiner Piper: Probably has been an erasure and asks you to explain it.

The Witness: I have no explanation for it. It's an erasure. I made a mistake and erased it.

By Mr. Henderson:

Q. Did you make a mistake on the following item, also?

A. I refuse to answer any more of these questions. I don't like the nature of it.

Hearing Examiner Piper: It is not up to you to object to the nature of the questions. If Mr. Wilson hasn't any objections you will have to answer in the absence of any ruling from me to the question.

[fol. 202] The Witness: What was the question.

Hearing Examiner Piper: I think it dealt with the figure underneath.

By Mr. Henderson:

Q. The figure was 276.5. I ask you again, wasn't there an erasure in connection with that figure, which was dated

December 30th, and if there was give us an explanation of it.

A. I don't remember that far. It was over a year ago.

Q. Does the same apply to the balance of your testimony, that anything that happened over a year ago you don't recall now?

Mr. Wilson: If Your Honor please, that's going just a little far. This man, he has written and kept his books and they are entered in pencil. He may have made a mistake and made erasures. He doesn't have to remember. There's no r-ason to cast any aspersions on his memory because he can't remember why he did that on those two occasions.

Hearing Examiner Piper: Objection sustained.

By Mr. Henderson:

Q. Mr. McClung, was that item originally 376.5?

A. No, sir.

Q. You positively deny that?

A. Because it is two hundred and some——

Q. It's been erased, has it not?

[fol. 203] A. It has been, yes, sir.

Q. Do you know what the original figure was there?

A. The original figure is there.

Q. Well, now, I ask you this: Why is there an erasure in connection with the item of 276.5 on December 30?

A. It looks like it, yes.

Q. Then, if there was an erasure, then it is not the original figure, is it?

A. No, sir.

Q. Now, let's take the next item. Wasn't that figure 302 instead of 402, being the 31st of December?

A. It is 302.

Q. Wasn't it originally 402 instead of 302?

A. No, sir.

* * * * * * *

By Mr. Henderson:

Q. I asked him—have you looked at it, sir?

A. I have looked at it.

Q. Looking at it, can you see an outline of a 4 underneath the 3 on it or not?

A. I don't know what it is. I erased it. That's the right figure.

. . . . . .

By Mr. Henderson:

Q. Now, Mr. Examiner, I will direct my questions to the witness, and I will continue. Do you know when that erasure was put in that book?

A. No, sir.

[fol. 204] Q. Do you know when any of these erasures were put in the book?

A. No, sir.

Q. Was this last sheet which was marked 22-F, all put on at one time, the figures thereon, or were they put on daily?

Mr. Wilson: What date was that?

Hearing Examiner Piper: Starting January 1st.

The Witness: They were put on daily.

By Mr. Henderson:

Q. That is, where the day appears that date they were inserted?

A. That's right.

Q. I just want to ask without going into any of these other erasures in connection with the items that appear herein, can you in any wise now recollect if there was any reason why the erasures of these days that I have referred to were following continuous days? Does that have any significance to you?

A. No, sir, it does not.

Q. None at all.

Mr. Henderson: Mr. Examiner, we would like the opportunity—I have arranged with Counsel for the Government to look at that Exhibit 22, if we may take it and give a receipt to the stenographer.

[fol. 205] Hearing Examiner Piper: Permission granted.

. . . . . .

By Mr. Henderson:

Q. Now, Mr. McClung——

Mr. Wilson: May I interrupt before you ask your question?

If Your Honor pleases, Mr. McClung's Counsel, Mr. Parris, is present in the room and I don't know how you proceed—some Examiners do and some do not—but is it permissible for Mr. Parrish to advise his client at any stage of this proceeding as to what he thinks is necessary?

Mr. Piper: I think it is admissible if he thinks he needs advice. He may consult with him on privilege and things like that. He has no right to objection the grounds of relevancy or things like that, but he does have the right to advise his client on the question of privilege and matters of that sort and the Commission Rules provide that a witness may appear by Counsel for those purposes.

Mr. Henderson: Well, now, I don't quite understand what this is. I object to this, Mr. Examiner. I never saw such a procedure.

Hearing Examiner Piper: No, you are not supposed to sit up here. If any question arises under which Mr. Mc-[fol. 206] Clung wishes to consult you, he will advise me of that fact, or if any question is asked which may call for confidential and privileged information, which you wouldn't want to give on the grounds of privilege, you may do so.

But, you can't sit here and advise him how to testify.

By Mr. Henderson:

Q. Well, now, Mr. McClung, your first delivery of gasoline was a full load, was it not? In August of 1955?

A. Yes, sir.

Q. And that was charged on the books of the Sun Oil Company, was it not?

A. Yes.

Q. Now, on November 4, 1955, a check in the amount of $1,122.22 was returned from your bank, was it not?

A. Yes, it was.

Q. And that was drawn on Springfield Atlantic Bank and was returned on account of insufficient funds, is that correct?

A. That is right.

Q. And the check, I believe was re-deposited on the same day, is that correct?

A. And it cleared.

Q. I beg your pardon?

A. And it went through all right.

Q. Now, as a result of that your credit relationship with the Sun Oil Company changed, did it not?

A. That is right.

Q. And what were they changed to?

A. Nothing but cash or certified check.

Q. And on December 5, 1955, you made some request of [fol. 207] Sun Oil Company to sur-charge your gasoline invoices a half-cent per gallon to apply on your indebtedness, did you not?

A. I made the request.

Q. You made the request in writing?

A. That is not the way I remember it, sir.

Q. Well, I will show you a letter. It may help your memory. Is that signature?

A. It probably is, but shall I tell you how it happened?

Q. No, just answer the questions.

A. It is my signature.

Q. Will you read the letter?

Mr. Henderson: Will you mark this as Respondent's Exhibit 3 for identification, being a letter of December 5, 1955.

(The paper referred to was marked as Respondent's Exhibit Number 3 for identification.)

By Mr. Henderson:

Q. At least, that is a document that you signed?

A. Yes, it is my signature.

Q. And which is dated the 5th day of December 1955——.

Hearing Examiner Piper: I thought you said December 12th?

Mr. Henderson: The 5th day of December, 1955.

By Mr. Henderson:

Q. (Continued)—as a result of which they surcharged your Blue Sunoco invoices one-half per gallon to apply on your indebtedness, is that correct?

[fol. 208] A. That is right, sir.

Q. Now, as of January the first—now, let me ask you this: Up to January the 1st, 1956, the gallonage figures which you gave on Direct Examination show that your high point was in September, 1955, is that correct?

A. No, sir, I don't think so because there are two months or two days extra there.

Q. Well, all right. You had three days in August?

A. Three days in August.

Q. And your total gallonage then was 11,534 gallons?

A. That is right.

Q. 11,534 gallons was for the month of September plus the three days in August?

A. The figure that I had there, I don't remember.

Hearing Examiner Piper: That is right.

A. That is right. That is for three days in August.

Q. Then you had a little over 10,000 in October? You had a little over 10,000 in November, which was about 250 gallons less than in October; and then in December your gallonage went up to 11,122, which is the highest gallonage that you had during the whole time, is that correct?

A. I think so, yes.

Q. And now on January the 1st, 1956, your terms were revised to a half-load of gasoline, load to load, is that correct?

A. I think so.

Q. Along about that period?

A. Sometime in there. I don't remember the date.

[fol. 209] Q. And it was based on a certified check or cash, is that correct?

A. Correct, sir.

Q. And a half-load would be how many gallons?

A. I don't recall exactly, sir.

Q. Well, about what, would you estimate it?

A. Well, a full load was better than 5,000 and a half,

load would be better than 2,500, somewhere along in there. I don't know.

Q. Now, then, you then put up a collateral deposit with the company originally, did you not, of $2,000?

A. That is right.

Q. And on January the 5th, 1956, you requested $1,000 of that collateral be returned to you and be credited to your account, is that correct?

A. Yes, sir.

Q. And that was actually received in Philadelphia on the 19th of January, 1956. Now, your real troubles were the credit troubles?

A. Absolutely.

Q. And when you speak in January of not getting gasoline it is because you didn't have the money to pay for it?

A. That is right, sir.

Q. And then you yourself gave the notice of termination of your arrangement with the Sun Oil Company?

A. That is right.

Mr. Henderson: That is all, Mr. Examiner.

[fol. 210] Redirect examination.

. . . . . .

Q. Now, Mr. McClung, on cross examination you just testified that your troubles were mainly credit. If you had been selling gasoline, even though you were purchasing it in half-truck load quantities, you would have been able to pay for your gasoline and wouldn't have had that trouble, would you not?

A. That is right, sir.

. . . . . .

By Mr. Wilson:

Q. Now, Mr. McClung, it was brought out on cross examination that in December, that was your best month. Now, you had had this station in operation some five or four months by that time, had you not?

A. Four months.

Q. How do you account for the fact that December was possibly your best month?

A. Well, it was slowly building up there. I mean, it always happens in an operation, when an operation is half-way decent.

Q. And after December, 1955, and beginning with January, 1956, did you still offer the same service in your station that you had previously?

A. Yes. Yes.

Q. As of January 1, 1956, did you still have the same number of employees?

A. Right.

Q. Did anything happen as far as you would know that would deter customers from going into your station other than the price after January 1, 1956?

[fol. 211] Mr. Henderson: Now, I object, if Your Honor pleases. We have gone over it in cross examination and the gentleman said that he had credit troubles and the station was closed part of the time. I object, Mr. Examiner, because it is repetitious.

Hearing Examiner Piper: Objection overruled, you may answer other than prices.

A. There wasn't any until I run out of gasoline.

Hearing Examiner Piper: I am not sure I recall. When did you start then running out of gasoline?

The Witness: Well, I don't know the exact date that I called Mr. Oatman and asked him if he would sell me five hundred gallons, and he said "No," to close it up.

Hearing Examiner Piper: Sometime after the 14th?

The Witness: Yes, it was. I would say, a rough guess, it would be around the 14th or the 15th and after it wasn't in operation like it should be because I knew there wasn't no use—there was only so much gasoline and I had two months lease.

Hearing Examiner Piper: After that your knew you—knew that you were not going to get any more gasoline even though you had the money?

[fol. 212] The Witness: That is correct, but I had the two months lease.

Hearing Examiner Piper: But you had some gas on hand, but your operations thereafter were not normal?

The Witness: That is right, were not normal.

Hearing Examiner Piper: But up to then you think they were?

The Witness: They were.

* * * * * * *

By Mr. Wilson:

Q. But there was a time when you had the $500 that you could pay cash?

A. Yes, that is when I closed up. I had $500 and called Mr. Oatman and asked *me* if he wanted me to close the station or would he sell me that much gas and he said to close it up.

* * * * * * *

Q. Now, haw many hours a day did you put in at this station?

Mr. Henderson: I object to this. I can't see the relevancy or the materiality of it. It is his station. He can put in all of the hours he wanted.

[fol. 213] Hearing Examiner Piper: I see the relevancy of it. Objection overruled.

The Witness: You mean while I was operating the station?

Hearing Examiner Piper: Operating it full time.

The Witness: I opened it at 7:00 in the morning and closed at 11:00 at night.

By Mr. Wilson:

Q. Were you there all that time?

A. No, sir.

Hearing Examiner Piper: He asked you how many hours you worked—or did you mean at the station?

The Wifness: I opened it up in the morning and stayed until about six o'clock at night. Anywhere from six to seven.

By Mr. Wilson:

Q. How many hours a day would you estimate?

A. About eleven.

* * * * * * *

Q. The price allowance that was, that you testified was given to Mr. McLean at 19th and Pearl didn't help your situation any at your station, did it, Mr. McClung?

A. No, sir, it hurt it very considerably. Made *not*—ters quite a bit worse.

[fol. 214] Mr. Henderson: I move, Mr. Examiner, to strike out the testimony of Mr. McClung concerning the testimony relative to misrepresentation as not being material to this particular issue here. His last answers, again, I think should be removed. It's nothing but repetition. However, I shall let that stand. Prior to that I make that motion.

Hearing Examiner Piper: Motion granted.

Mr. Wilson: Your Honor please, I didn't understand the import of that ruling.

Hearing Examiner Piper: He moved to strike from the record as immaterial Mr. McClung's testimony about the misrepresentation of the gallonage of the station when he bought it, when he took it over, whatever you call it, as being irrelevant to the issues of this case.

Mr. Wilson: If Your Honor please, may I be heard just briefly on that?

Hearing Examiner Piper: Yes, sure.

Mr. Wilson: I will admit it is irrelevant to the issues in this case, but Mr. Henderson opened up the Pandora box in testing the credibility of this witness, and I think the Com-[fol. 215] mission should have that before it when it makes its decision, and I think you should, because Sun Oil Company was guilty of a few things.

Hearing Examiner Piper: Will that effect the credibility of the witness?

Mr. Wilson: I think it will go a long way to indicate the stability of his testimony.

Hearing Examiner Piper: I don't follow you. The function now, there might be certain questions asked on cross to go to the credibility of the witness.

Mr. Wilson: That's what I mean.

Hearing Examiner Piper: To impeach the credibility of the witness, but I don't see how you can argue that he feels Sunoco misrepresented something to him, to preserve the integrity of a witness, or offset the impeading factors they have raised.

Mr. Wilson: I definitely disagree with you. I think it lends credence to this witness's testimony where Sun Oil Company misrepresented this situation to him. Now; they have brought out he had a bad credit rating. I think——

Hearing Examiner: They are not trying to bring it out. They brought it out. He admitted it

[fol. 216] Mr. Wilson: I admit it.

* * * * * * * * *

Mr. Wilson: As to his credit standing: In other words, whether or not he gave them a rubber check, and so forth, and yet you are striking that, and the Commission has no opportunity to screen that and see this witness's testimony in question. I think you are in error.

Hearing Examiner Piper: No, no. The man was not making enough money in the place, that's clear. The point is, his credit became bad because his finances became bad, because he wasn't selling enough gas. That's self-evident. Those are the facts. Whether or not that was brought about by an original misrepresentation I don't think is relevant to any issues in this case: It's very interesting, and if it's true, I think it is somewhat reprehensible, but I don't think it has anything to do with the case. There is enough in the record now, so I'm sure the Commission is going to know what you are talking about as to relevancy. It's there.

Mr. Henderson: You are finished with your witness?

Hearing Examiner Piper: Oh, I did have a question. On these records of yours, Mr. McClung, what is this column, Daily Volume, mean?

[fol. 217] The Witness: It is a dollar and cent value.

Hearing Examiner Piper: That's the dollars you paid for the gas?

The Witness: No. The customer paid.

Hearing Examiner Piper: That the customer paid you?

The Witness: No. That's cash.

Hearing Examiner Piper: What you sold it for?

The Witness: Yes.

Hearing Examiner Piper: I see. Those figures then are supposed to represent the number of gallons shown in the first column converted into dollars?

The Witness: And cents.

Hearing Examiner Piper: Sold?

The Witness: That's right.

[fol. 218] Hearing Examiner Piper: That's right. Sales. Well, then, that's what I suspected. I turn again to the three dates, or two dates, that counsel for respondents referred to, December 29. I show you—this record shows and those are your records, that there has been some talk about erasures. That on December 29 you sold 275 gallons of gasoline. Is that correct? .2?

The Witness: (The witness shook his head affirmatively.)

Hearing Examiner Piper: For which you took in how much money, according to your record?

The Witness: $79.45.

Hearing Examiner Piper: $79.45. Yet, the next day you sold one gallon more, and took in $108.77?

The Witness: No. That's not right.

Hearing Examiner Piper: It sure can't be. That's what I am driving at. So, there's something wrong with the figures for December 29 and 30? Now, we can find out which it is if I know how much you were selling the gas for.

The Witness: 28.9.

[fol. 219] Hearing Examiner Piper: 28.9. That's a very simple computation. One or the other figures must be wrong. It should be multiplied, the number of gallons you sold should come out with the figures in the second column?

The Witness: Yes.

Hearing Examiner Piper: The 31st. With figuring it out, looks approximately in line with your 30th. It shows 316 gallons.

The Witness: Yes, sir, and $110 and some cents.

Hearing Examiner Piper: Taken in, in line with your figures for the 30th, that seems to be approximately right, but obviously, there's something wrong.

The Witness: Yes, there is. I didn't try to doctor that up.

Hearing Examiner Piper: No, I'm not suggesting you——

The Witness: I don't know what's wrong. I don't know what's wrong. I have been trying to figure it out.

Mr. Wilson: Mr. Examiner?

[fol. 220] Examiner Piper: Do you want this on the record?

Mr. Wilson: Yes, sir, I would like this on the record.

Hearing Examiner Piper: I am trying to do some figuring here. I will be done in a minute. According to my computations 275 gallons multiplied by 29 cents would give you $79.47 odd cents, and you have $79.45 which is close enough. To save us worrying about it, but then it shows quite clearly that the error is in December 30 rather than in December 29, and if the error is in December 30, then I would say December 31 also has to be wrong. I don't have to multiply again. This is only one gallon more. All you would have to do is add 28.9 to the figure in the preceding column and you would still be under $80.00. So, the figure in column three should be less than $80.00.

Mr. Wilson: Your Honor, I would like to bring out something right here. I would like to ask the witness two or three questions.

Hearing Examiner Piper: Just a minute. You can have all the questions you want. Now, if my multiplication is correct, you sold 302 gallons on the 31st for $87.00 and you have $116.21. Now, ask your questions.

Mr. Wilson: Doesn't the answer suggest itself to you, Mr. McClung, as to how that error occurred?

[fol. 221] The Witness: No, it doesn't.

Mr. Wilson: Now, isn't it possible—let me ask you this. Did you have a cash register?

The Witness: No, we didn't.

Mr. Wilson: You didn't use a cash register? How did you determine your day's receipts?

The Witness: By multiplying like he did. Taking a gallon and multiplying.

Mr. Wilson: You had grease jobs, did you not?

The Witness: Yes, but they were on a separate——

Mr. Wilson: You sold oil?

The Witness: They were separate, then, too. It's some error I made.

Hearing Examiner Piper: When you say they were separate, you mean they were on here?

[fol. 222] The Witness: Yes.

Mr. Wilson: Then, it is not possible that the one hundred some odd dollars you had is a total for your day's receipt?

The Witness: No, it is strictly an error in multiplication.

It's not an error in oil or grease. It's over here some place.

Mr. Henderson: I think it is quite right, which we will show later.

Hearing Examiner Piper: I assumed these figures came from cash registers.

The Witness: No, we didn't use cash registers.

Hearing Examiner Piper: What figures over here came from some source other than computation?

The Witness: From the pump.

Hearing Examiner Piper: From the pumps? In other words, the gallons shown came from the pump?

The Witness: Yes.

[fol. 223] *The Witness: Yes.*

Hearing Examiner Piper: You have more than one pump?

The Witness: Two.

Hearing Examiner Piper: Do you start out in the morning and subtract from the evening figure?

The Witness: Yes.

Hearing Examiner Piper: Can you get the dollar figure? Did you multiply like I did?

The Witness: Yes. They have a thing on the gas pumps.

Hearing Examiner Piper: That shows dollars?

The Witness: That's right.

Hearing Examiner Piper: But you didn't use that?

The Witness: No.

Hearing Examiner Piper: Was there any checking made at the end of each day with cash on hand with these calculations? Do you follow what I mean?

[fol. 224] The Witness: Yes.

Hearing Examiner Piper: In other words, at the end of each day you compiled your gasoline sold by the price and came up with a figure you ought to have that much cash in the till, or whatever you call it, in your pocket?

The Witness: Yes, it was. Of course, it wasn't an accurate checking.

Hearing Examiner Piper: When was this checking done?

The Witness: In the morning.

Hearing Examiner Piper: In the morning. For the preceding day?

The Witness: That's right.

Hearing Examiner Piper: Then, you should have on hand

the money representing all your sales of gas, oil, and so forth, shown on here?

The Witness: Uh-huh. (Indicating the affirmative.)

Hearing Examiner Piper: The next morning. You kept cash?

[fol. 225] The Witness: That's right.

Hearing Examiner Piper: Not the employees?

The Witness: Well, he got it when I was there.

Mr. Wilson: He left at 6 and the station was open until 11.

Mr. Henderson: May I ask him one question on this?

Hearing Examiner Piper: Yes.

Mr. Henderson: On the item of December 31 which is 302 gallons, which apparently has been an erasure—402 would bring $116.21, which is the total on there, would it not?

The Witness: I don't know, sir. I'm stupid, but I don't think I could do something like that. I don't know where those figures came from.

Mr. Henderson: If that's your answer, let it remain.

Hearing Examiner Piper: Your answer is, you don't know?

[fol. 226] Mr. Henderson: We don't have to belabor that point. We have already obtained that, and that's what it is.

. . . . . .

Hearing Examiner Piper: Let the record show that Mr. Dietshe was excused because the last witness came from out of town and so we took him out of turn and Mr. Dietshe is now being recalled for further examination.

MAXIMILIAN DIETSHE, was recalled as a witness, resumed the stand and further testified as follows:

Direct examination (Continued).

By Mr. Wilson:

Q. Now, Mr. Dietshe, I believe you were asked previously whether or not there didn't come a time during or after the price war of last year in the City of Jacksonville that the prices leveled off to a 20.9 for the majors and 19.9 for the independents, and I believe that you advised us at that time that you couldn't answer that question without your records?

A. That is right.

Q. And if I understand correctly, Commission's Exhibit Number 23 is a price survey indicating—or rather a records of those events?

A. On that date, at that time, 9:00 a.m.

[fol. 227] Q. Was that conducted by the Sun Oil Company?

A. By salesmen in the field.

Q. But at any rate, according to your best information, when did the independents and the majors stop selling at the one-cent differential and resume the other price differential?

A. I don't think it ever happened.

Q. You don't think it ever happened?

A. No, sir, I don't think it ever happened, that they stopped selling at one cent and resumed at a two cent differential.

Q. Well, aren't they doing it now?

A. No, sir.

Q. Isn't there a two-cent spread between the independents here in Jacksonville?

A. No, I am sorry to say, there isn't.

Hearing Examiner Piper: What is it?

The Witness: It is from one cent to a nickle or six cents or seven cents.

By Mr. Wilson:

Q. You mean the independents?

A. Uh-huh (indicating the affirmative).

Q. But couldn't you say that predominately the differentialy is two cents?

A. I don't know. I would have to look at the last survey to be made on something like that.

Q. Would Mr. Beardsley know that?

A. He probably would.

[fol. 228] Hearing Examiner Piper: Is this supposed to represent prices for the same grade of gasoline?

The Witness: Yes, sir, regular.

Hearing Examiner Piper: But, some Shell stations were selling regular gas for 20.9 and others selling it for 29.9?

The Witness: That is right.

Hearing Examiner Piper: Here in Jacksonville?

The Witness: Yes, sir.

Hearing Examiner Piper: Nine cents difference?

The Witness: Yes, sir.

Hearing Examiner Piper: The same gas?

The Witness: The same gas.

Hearing Examiner Piper: I just wanted to understand the Exhibit. I thought maybe there were two grades of gasoline on here.

[fol. 229] The Witness: No.

* * * * * * *

Q. Now, I may have covered this, but if I have, will you excuse me, but I want to ask Mr. Dietshe while he is on the stand whether or not the real cause of the gasoline war in Jacksonville last year was not the fact that the independent gasoline stations in Jacksonville and throughout the State of Florida hold an unusually large share of the market?

A. I can't answer that question. I don't know.

Q. Now, I will ask you, Mr. Dietsch, if you did not so advise the attorney examiner who interviewed you on March 5, 1956, that that was a fact?

A. I did not.

Mr. Henderson: Mr. Examiner, it was covered, but it is all right.

Hearing Examiner Piper: Yes, I think he had.

* * * * * * *

Cross-examination.

By Mr. Henderson:

Q. Mr. Dietshe, I show you a document which we will mark for identification as Respondent's 5, is that right?

Hearing Examiner Piper: 4.

[fol. 230] Q. 4. And ask you what it is.

A. It is a summation on April 3d, 9:00 a.m. of prices prevailing among the various companies and the independents marketing gasoline in Jacksonville.

Hearing Examiner Piper: April 1955?

The Witness: '55, yes.

By Mr. Henderson:

Q. That is a result of the operations, your own office? You make that statement out?

A. The District office, yes, sir.

Q. All right. And they show there as not a stability of prices as far as that particular day is concerned, is that correct?

A. That's correct.

Q. I'll ask you this one last question. Prior to this price was of 1956 here in Duval County in connection with gasoline were prices unstable, going back to the beginning of 1955?

A. Yes, they were.

Q. They were not uniform?

A. No.

* * * * * * * *

[fol. 231] BEFORE FEDERAL TRADE COMMISSION

Council Chambers, Jacksonville City Hall, Jacksonville, Florida

February 6, 1957.

Met, pursuant to notice, at 9:30 a.m. Before Robert L. Piper, Hearing Examiner.

APPEARANCES:

Rufus E. Wilson, Esq., Attorney for the Federal Trade Commission.

Ross E. Young, Esq., Attorney for the Federal Trade Commission.

Joseph W. Henderson, Esq., Attorney for the Respondent, Sun Oil Company, 1910 Packard Bldg., Philadelphia 2, Pennsylvania.

Leonard J. Emmerglick, Esq., Attorney for the Respondent, Sun Oil Company, 1826 Jefferson Place, Washington 6, D.C.

Henry A. Frye, Esq., Attorney for the Respondent, Sun Oil Company, 1608 Walnut Street, Phila., Pa.

Cyril C. Copp, Esq., Attorney for the Respondent, Sun Oil Company, 1625 Barnett National Bank Building, Jacksonville, Florida.

* * * * * * *

[fol. 232] BILL CRABTREE, was called as a witness for the Commission, and, having been first duly sworn testified as follows:

Direct examination.

* * * * * * *

Q. Where are you employed?

A Cleveland Electric Company at the Missile Base.

Q. In what capacity, sir?

A. Paymaster.

Q. Now, where were you employed previously to that tenure of employment?

A. Well, I had about a month's employment here in Jacksonville and then prior to that I was a Sun Oil Company dealer.

Q. What were you doing with the Sun Oil Company?

A. I had a station under lease from them.

Q. And about when did you commence operating or working for Sun Oil Company?

A. August 1st, '54, I believe it was.

Q. And did I understand you to say that you were operating a service station?

A. That is right. 6706 Main.

Q. And that is in Jacksonville?

A. Right.

* * * * * * * *

Q. When did you cease operating if you did?

A. September the 16th, 1956.

Q. Now, Mr. Crabtree, you were asked by Counsel for the Federal Trade Commission to bring your records with you with respect to the operation of your station?

[fol. 233] A. Yes, sir.

Q. And is this the book that you gave to me?

A. That is the book I gave to you. That is for starting January, 1956. I mean prior to that I didn't bring.

Q. Now, what happened if anything, that would cause you to not bring it?

A. I just didn't think about it.

Q. You just forgot it?

A. I just forgot it. I brought that book and I knew after I got halfway to Jacksonville I realized that the previous years were not in that book and I told you that when I got in town.

Q. Now, are the entries in this book, Mr. Crabtree, made by you?

A. Only me.

Q. And they were made in the usual and ordinary course of operation of your business?

A. Daily records.

Q. Now, would that be true of the other ledgers if it were here?

A. It would.

Q. And is it a ledger similar in all respects to this one?

A. It is.

. . . . . .

Mr. Wilson: If Your Honor please, I would like to have this marked for Commission's Exhibit for identification and——

Hearing Examiner Piper: 25.

[fol. 234] Mr. Wilson: 25, and I suggest, sir in view of what I am about to say that it be marked as Commission's Exhibit 25-B. I say that, because I am going to ask Mr. Crabtree, I have already asked Mr. Crabtree, and he has assented to furnish me at the earliest possible date with 1955 ledger, and I understand that Mr. Henderson, counsel for the Sun Oil Company, desires to say something with respect to that.

(The document referred to was marked Commission's Exhibit 25-B for identification.)

Mr. Henderson: May I first, Mr. Piper, just ask Mr. Crabtree a couple of questions concerning 25-B, which will also be applicable to what I assume you are going to put——

Mr. Wilson: 25-A.

Mr. Henderson: 25-A, which will be a day book, at least that's the mark on the outside of this. Is it a similar book, Mr. Crabtree?

The Witness: It is.

Mr. Henderson: The outside is entitled "Day Book"?

The Witness: I'm not sure.

[fol. 235] Mr. Henderson: I don't want to hold you to it, sir.

The Witness: It's similar to it.

Mr. Henderson: Anyway, it's a similar type of book for the year 1955?

The Witness: '54 and '55.

Mr. Henderson: '54 and '55?

The Witness: Yes, sir.

Mr. Henderson: Now, you have in this book of January 1956 your records so far as gasoline is concerned, I take it, for that period you operated in 1956?

The Witness: Yes.

Mr. Henderson: And when were the totals taken, such as, say, the gasoline totals were concerned. Have they just been done now?

The Witness: Daily.

[fol. 236] Mr. Henderson: But the monthly total, Mr. Crabtree?

The Witness: At the end of the month.

Mr. Henderson: And do you have a cash register or how do you, from where do you procure the items that you put in this book? Say, here's the first day of January, 1956, which is 866.2 gallons. Where does that come from, what source?

The Witness: From your daily worksheet and your pump readings. You have a metered calibrated dial on your pump and take them at the close of business each day.

Mr. Henderson: Who takes them, you or your employees?

The Witness: I do.

Mr. Henderson: That was true of the other book as well as this?

The Witness: Yes, sir.

Mr. Henderson: Is there any other thing you wish to add as to how this information is derived from which goes into this book?

[fol. 237] The Witness: No.

Mr. Henderson: Is the item "Gas" represent the dollars, Mr. Crabtree, in the second column there?

The Witness: Yes, sir, dollars and cents.

Mr. Henderson: Mr. Crabtree, I show you here again in January, there's 19 and 20—and 20—or 21 and 22. I don't want to confuse you in any possible way.

The Witness: That was two days.

Mr. Henderson: Well, there may be in other books when you have not put it in daily.

The Witness: Two days at once.

Mr. Henderson: Two days at other times?

The Witness: Well, possibly. Well, maybe——

Mr. Henderson: What I am trying——

[fol. 238] The Witness: Maybe, I don't check up daily, and checked up every day. I was working at the post office concurrently at that time.

Mr. Henderson: But this will be your accurate record

and what appears in the 54-55 book will be the days of your major readings, which is transferred to the book, is that correct?

The Witness: Yes.

Mr. Henderson: And it came from your daily sheets?

The Witness: Yes.

By Mr. Henderson:

Q. Now, we do notice some items in here of prices. I take it those were the prices you were charging at that time?

A. Retail price of gasoline, yes.

Q. And that appears in pencil?

A. Yes.

Q. In the book. All I am trying to do is get it straight when we look at your '55 book.

A. Yes.

Q. Is there anything else, just looking at that, that you can point out to us that will help us when we look at your '54-'55 book?

A. I think it will be self explanatory.

[fol. 239] Q. And all the items are your own?

A. Yes.

Mr. Henderson: Now, Mr. Examiner, we understand that the witness has not produced the records which he was requested to produce for '54 and '55 through inadvertence. Is that correct?

The Witness: Correct.

Mr. Henderson: The Government conferred with us concerning this matter and we wish to be entirely practical; if we could, relative to it and not to unduly delay this hearing and it would have required a couple more days to have gotten the book.

We understand that Mr. Crabtree, as we are advised by Commission's Counsel, will testify as to the questions of totals from 1955 from his book and we therefore, if the Government will present a similar book for 1954 and '55, we will not object to that at this time, Mr. Piper, but will reserve the right after we are furnished with the book

which we understand will be promptly, if there are any matters in there that appear in that book upon which we feel that we should ask questions, we then wish to have the right to have a closed deposition—as I think you call them, Mr. Piper, under the rule—issued to Mr. Crabtree to take to procure that information.

In other words, any testimony that he will give concerning the 1954 and 1955 book with reference to the book similar to 25-B will be as far as this record is concerned, will be conditioned upon his furnishing that book to Counsel [fol. 240] and the Commission which they will forward in turn to us and then further if we do want to ask any questions concerning it, that Mr. Crabtree will be available wherever he is. That is, where he is located to answer those questions.

Is that agreeable to you, Mr. Wilson?

Mr. Wilson: By the procedure outlined.

Mr. Henderson: By the procedure I outlined that I will put it this way: We will call it simply a closed deposition——

Hearing Examiner Piper: Well, it is set forth in Rule 3.12 of the Commission's Rules of practice and procedure outlines the taking of depositions and interrogatories.

Mr. Henderson: All right, that is all.

Hearing Examiner Piper: Is it satisfactory?

Mr. Wilson: Yes. I might say that Mr. Henderson didn't mention, he just only barely touched upon the fact that Mr. Crabtree's testimony with respect to the 1954 and 1955 operation would be subject to strike if that book wasn't furnished.

I would just like to make it clear that it is our understanding that the only testimony that would be subject to the motion to strike would be that testimony pertaining to his average monthly sales for 1955 and his aver- [fol. 241] age monthly sales for October, November and December of 1955?

Mr. Henderson: That is all of the questions you are going to ask in that connection, yes. In other words, as far as we are concerned what is already in evidence which are the invoices has no application to this suggestion which I am presently making at all. The question of the testimony is,

he is going to testify from his memory from his record book, which record book is not here.

Mr. Wilson: Thank you, Mr. Henderson.

. . . . . .

Mr. Wilson: Have you ruled?

Hearing Examiner Piper: I was trying to remember. In case I didn't, Commission's Exhibit 25-B is received and let the record show that when and as if the exhibit is offered under the circumstances outlined by Counsel, 25-A will be received.

(The documents referred to, heretofore marked for identification Commission's Exhibits 25-A and 25-B, was received in evidence.)

By Mr. Wilson:

Q. Now, Mr. Crabtree, I will now show you Commission's Exhibit 3-A through B, and ask that you—which are [fol. 242] in evidence, and ask that you examine them. The first I want to ask you whether or not that is your signature on the bottom?

A. It is.

Q. Of the exhibit? And I will now ask you to go through your October invoices and as you do indicate the number of gallons of gasoline purchased. Just read it out.

A. Well, 5,200 on 3rd; 5200 on the 10th; 5270 on the 20th.

Mr. Henderson: May I suggest this be tied up with the exhibit? Perhaps I don't understand the figures, I'm sorry.

Hearing Examiner Piper: What exhibit?

Mr. Henderson: This isn't an exhibit.

Hearing Examiner Piper: Yes, it is an exhibit.

The Witness: October 28, 5270. That's a total of 20,940.

Mr. Wilson: Now, Mr.——

Mr. Henderson: It is the exhibit. I just thought that we had the page number on the exhibit. He has given the dates. That's all right with me. It's the exhibit, however.

[fol. 243] Mr. Wilson: And his serials, A, B, C, on down.

By Mr. Wilson:

Q. And your total was 20,940 for October?

A. That's a fast computation, but I guess that's right.

Q. Would you repeat that for November?

A. November 7, 5270; November 16, 5200; November 25, 4335.

Q. Now, in a—we have—you could probably look at it.

A. 14,805.

Q. That's correct? 14,805?

A. Correct.

Q. Now, would you repeat the same process for December?

A. December 2, 5200; the 13th, 5200; 23rd, 5270; 30th, 5065. Total of 20,735 gallons.

Q. Have you added that up? It that correct?

A. Well——

Q. Look at it.

A. That's correct.

By Mr. Wilson:

Q. Now, according to Commission's Exhibit 25-B that is in evidence, your sales for January, 1956, amounted to 10,470 gallons?

A. No, 14,000.

Q. Excuse me, I am sorry. 14,511.3?

A. Correct.

Q. I am sorry. Now, Mr. Crabtree, can you account in any way for your apparent decrease in gallonage for October, November and December to January, 1956?

A. Well, actually, there should be an increase.

[fol. 244] Mr. Henderson: Now, you have not been asked that. I object, Mr. Examiner.

A. But to answer your question——

. . . . . .

Hearing Examiner Piper: So go ahead.

A. The first of January I noticed a station at 19th and Pearl selling gas 3 cents cheaper than I was and—do you want me to go on and tell my story?

By Mr. Wilson:

Q. In your opinion did that account for the reduction in gallonage?

Mr. Henderson: I object to that as being leading.

Hearing Examiner Piper: Well, the witness asked him a question if he wanted him to go on and he answered it. If that is the answer to the question.

Mr. Wilson: Yes.

Hearing Examiner Piper: I don't think it is leading. Go ahead.

By Mr. Wilson:

Q. Go ahead and just tell your story.

[fol. 245] A. Well, about the 1st of January I noticed the station at 19th and Pearl operated by a lessee from Sun Oil Company selling gas 3 cents cheaper than I was and I went down there and helped this fellow out a couple of hours.

Hearing Examiner Piper: What fellow?

The Witness: McLean.

Hearing Examiner Piper: The fellow at 19th and Pearl?

The Witness: The lessee.

A. (Con'd) and noticed a lot of my customers coming in there and getting their gas. Well, I waited on them and helped him and they said, "You don't blame us," and I said, "No, you can buy here as cheap as I can buy it," and I believe that accounts for my drop in the gallonage.

Q. Now, at that time or was there a subsequent time that you decided to talk to Mr. McLean about that situation?

A. Sure. I raised all kinds of dickens about it and went down there and got a copy of his invoice to prove that Sun Oil Company was selling it to him cheaper than they was to me.

Q. Did someone accompany you on this occasion?

A. Well, Mr. McClung over at 34th and Main when we got the invoice.

Q. Who was Mr. McClung?

[fol. 246] A. He was a Sun Oil Company dealer at 34th and Main.

Q. And at that time what if anything, did Mr. McLean say to you about the situation?

Mr. Henderson: Now, Mr. Examiner, I renew the objection that I made yesterday that this is hearsay. Any conversation Mr. McLean may have had with Mr. Crabtree and when Mr. McClung was with him, I think he said he was, is hearsay as far as the Sun Oil Company is concerned and it was not with an officer or director and in no way could bind the Sun Oil Company. It is not material and relevant to this case as far as I am concerned.

Hearing Examiner Piper: Well, as I read the complaint he is a co-conspirator, so to speak, under count 2 and— objection overruled. You may answer what Mr. McLean said.

Do you remember the question?

The Witness: Would you repeat the question?

Hearing Examiner Piper: Read it.

(The reporter read the question as follows:

"Question: And at that time what, if anything, did Mr. McLean say to you about the situation?")

A. I asked him how he was selling gas 3 cents cheaper than I was and he told me that the company was absorbing [fol. 247] 1.7 cents of it and he was absorbing 1.3 cents of it.

By Mr. Wilson:

Q. Was anything said to you by Mr. McLean as to the price at which gasoline was to be sold?

A. Well, you see, they had some cut rate stations on the opposite corner of this Sunoco Station, a Super Test, I believe, and a Colonial, and they were selling it cheaper and it was hurting this McLean, so to offset that why the company gave him a 1.7 discount, and he absorbed 1.3 of it to sell it for 25.9. Three cents cheaper than me.

Q. Did he say to you that in order for him to get the 1.7 allowance that Sun Oil Company had required him to absorb 1.3 or reduce his profit by 1.3 percent?

Mr. Henderson: Mr. Examiner, I certainly object to that as leading.

Hearing Examiner Piper: Objection sustained.

By Mr. Wilson:

Q. Did he indicate to you in anyway, Mr. Crabtree, that Sun Oil Company had required him to do anything to obtain the 1.7 allowance?

Mr. Henderson: I object to that, Mr. Examiner, likewise.

Hearing Examiner Piper: Objection sustained.

[fol. 248] By Mr. Wilson:

Q. What was said to you, if anything, by Mr. McLean concerning his partial absorption of the decrease in price?

A. Well, I don't recall that there was anything said about it. However, it was understood that——

Mr. Henderson: I object to that, if your Honor please.

Hearing Examiner Piper: It was understood? What do you mean by that?

The Witness: It was understood to meet competition that he had to sell it three cents less.

Hearing Examiner Piper: Well, was that your understanding?

The Witness: Yes.

Hearing Examiner Piper: Well, we are not interested in that. We are interested in what Mr. McLean said.

The Witness: Well, it would be hearsay.

Hearing Examiner Piper: No, we have decided it wouldn't be.

The Witness: Don't you have him as a witness?

[fol. 249] Hearing Examiner Piper: Well, that is beside the point. Maybe we have, but we want to hear what he said to you.

By Mr. Wilson:

Q. We want to head what Mr. McLean said to you, Mr. Crabtree.

A. Well, we gassed around there a whole lot and I was there several times——

Hearing Examiner Piper: Well, we understand that but on the subject we are now on, if anything.

A. Well, you are trying to pin me down to saying that he told me that Sun Oil made him sell it for three cents.

By Mr. Wilson:

Q. I am not trying to pin you to say anything. I want you to tell the truth that you swore to on the Bible.

A. I am telling the truth.

Q. All right, is that all Mr. McLean said to you at that time about his absorption or the reduction in his profit?.

A. Well, I don't remember.

Mr. Wilson: Now, if your Honor pleases, I have been taken by surprise and I ask to be permitted to ask this witness leading questions.

Hearing Examiner Piper: All right.

[fol. 250] Mr. Emmerglick: Now, just a minute.

Mr. Henderson: Mr. Examiner, I object to a procedure further along this line. If Counsel for the Commission has a written statement which is contrary to the witness's statement that is one thing. I have not seen any as yet produced. Certainly the witness is not showing any hostility in any manner as far as I am concerned. The mere fact that the answer isn't just exactly what Counsel had hoped to receive isn't sufficient for the matter of pleading surprise of any law suit that I know of.

I do not think that there has been sufficient grounds laid here to show that this gentleman is at all hostile. On the contrary, I think he is trying to tell the truth as best he can and is doing so and I object to the leading questions.

Hearing Examiner Piper: The witness has indicated that he doesn't remember and it is well established under the rules of evidence that one of the methods of refreshing recollection is the use of leading questions. However, I think that is subject to some abuse and I would like to suggest for the benefit of Counsel that this type of leading question be asked rather than a question which suggests the answer and calls for a yes or no answer.

I think that is bad because while some Courts permit its use to refresh recollection, to me it merely amounts to putting the answer in the witness' mouth and absent a showing that the witness is hostile seriously reflecting upon the weight of the testimony, if nothing else, I think the

[fol. 251] better and proper procedure is to use questions which suggest the subject matter generally to be recalled rather than a specific answer.

For example, a question which asked did Jones say he was the man that pulled the switch, clearly suggests the full answer and can be answered yes or no and is clearly leading.

However, a question might be asked what, if anything, was said about the switch, and while this question suggests the subject matter it clearly does not suggest the answer.

Now, I suggest since the witness has indicated that he does not remember, that you may use leading questions to refresh his recollection without using questions which give him the answer.

Mr. Emmerglick: Now, may we have just a moment?

Hearing Examiner Piper: All right, sir.

Mr. Emmerglick: As I under the rules, Mr. Examiner, this may be done where it appears that a witness is hostile and unwilling or evasive. This would require a preliminary finding by the Examiner that this witness appears to be either hostile, unwilling, or evasive, and we would like to ask whether or not you feel that you can on the basis of what has gone before make such a finding?

Hearing Examiner Piper: No, I am not making any such findings. I explained my position.

[fol. 252] Mr. Emmerglick: Well, if not then, I think there is no occasion to use the method which counsel has suggested he use, the method of examining the witness as a surprise. I think in the absence of such a finding under 3.16-(c)——

Hearing Examiner Piper: You are talking about a different rule of evidence. That is the rule applicable when a witness proves hostile and unwilling or adverse. I am not talking about that. I am talking about refreshing recollection.

Mr. Emmerglick: Now, if his recollection is to be refreshed——

Hearing Examiner Piper: He just testified, if I heard him correctly, that he couldn't remember.

Mr. Emmerglick: Well, now, as I understand it, recollection may be refreshed by drawing his attention to a prior statement.

Hearing Examiner Piper: That is one method. There are many methods.

Mr. Emmerglick: I don't know what he proposes to do but I gather he proposes to treat the witness as hostile because he used the word as a present condition for that surprise. May be I miscomprehended what he intends to do. [fol. 253] Hearing Examiner Piper: Well, I outlined what I think he has a right to do. There is a difference between your surprise, hostility and refreshing recollection. They are entirely different subjects.

Mr. Emmerglick: Right, sir.

Hearing Examiner Piper: Do you want to proceed, Mr. Wilson?

By Mr. Wilson:

A. I believe you testified, Mr. Crabtree, that on one occasion you went to talk to Mr. McLean in company with Mr. McClung?

A. I did.

Q. And was it on that occasion that Mr. McLean gave you the invoice?

A. Yes, sir.

Q. And at that time did Mr. McLean explain to you and to Mr. McClung the arrangements that he had made with the Sun Oil Company that enabled him to sell the gasoline at three cents less than you were selling it?

A. Well, along with a copy of the invoice it showed that they were giving him a 1.7 cent discount per gallon and he was absorbing 1.3 cents of it.

Q. What, if anything, did he say to you at the time as to his absorption of the 1.3 cents per gallon?

A. Well, in order to meet competition there on the corner, well, he had to reduce his price three cents and the company presumably agreed——

[fol. 254] Mr. Henderson: Now, I object to that, Mr. Examiner.

By Mr. Wilson:

Q. Did Mr. McLean say the company agreed?

Hearing Examiner Piper: Don't presume anything.

The Witness: Yes, he showed us the invoice where the company was absorbing 1.7 cents of it.

Hearing Examiner Piper: The question we are trying to get answered, Mr. Crabtree, counsel is trying to get answered, Mr. Crabtree, is did, as I understand it, did Mr. McLean ever tell you why he was absorbing 1.3 cents of that three cents price reduction?

The Witness: Yes.

Hearing Examiner Piper: Why?

The Witness: Because to meet competition.

Hearing Examiner Piper: Did he tell you that?

The Witness: Yes.

[fol. 255] Hearing Examiner Piper: That's the question we are asking. Not what you conclude, but what he said.

The Witness: Sure.

Hearing Examiner Piper: He said he was absorbing that?

The Witness: That's right.

By Mr. Wilson:

Q. Did he say to you, Mr. Crabtree, he was voluntarily absorbing that 1.3 cents gasoline?

A. Well, I don't imagine it was voluntary.

Mr. Henderson: I object to imagination.

Hearing Examiner Piper: Yes.

By Mr. Wilson:

Q. Did he say to you——

Hearing Examiner Piper: You must try to distinguish between your conclusions and what he told you about that situation. All we are trying to find out is facts, as to what he said.

By Mr. Wilson:

Q. Did he say to you he was voluntarily doing that? Or did he indicate any other reason why he was doing it?

[fol. 256] A. No, he didn't. He wasn't voluntarily doing it. He was doing it under pressure of competition.

Q. Did he say anything to you about any conversation he had with any salesman from the Sun Oil Company?

A. No, sir.

Mr. Henderson: Mr. Examiner, I object to the question. I think——

Mr. Wilson: He said no.

Mr. Henderson: Well, he said no, so it's all right I think any any further questions along this line, it seems to me the witness is trying to answer. There should be some limitations on the question.

By Mr. Wilson:

Q. Do you have any reason, Mr. Crabtree, for not answering the question exactly as I——

Mr. Henderson: Objection.

Hearing Examiner Piper: Let him finish.

By Mr. Wilson:

Q. I have asked it.

Hearing Examiner Piper: What was the question?

[fol. 257] (The reporter read the question as follows:

"Question: Do you have any reason, Mr. Crabtree, for not answering the question exactly as I have asked it?")

Hearing Examiner Piper: You answered no?

The Witness: No.

By Mr. Wilson:

Q. Did you talk to me last night, Mr. Crabtree, about this matter?

A. Yes, sir.

Q. And Mr. Young was in the room?

A. Yes, sir.

Q. And your son-in-law was along, was he not?

A. Yes, sir.

Q. Didn't I ask you to relate your conversation on the occasion of your visit to Mr. McLean?

A. Yes, sir.

Q. Didn't you tell me that——

Mr. Emmerglick: Just one moment.

Mr. Henderson: I object.

Mr. Wilson: I have been taken by surprise, Your Honor, and I have a right to ask the witness what he told me.

[fol. 258] Mr. Henderson: Mr. Examiner, I don't know whether Mr. Wilson proposes to take the stand and remove himself from this case or not, but it seems to me that Your Honor may question, to make a ruling, whether or not Mr. Wilson has been taken by surprise. The fact that he discussed the matter with the witness is not a ground for surprise, that I know of. The man is on the witness stand under oath, now.

Hearing Examiner Piper: I think the question—go ahead. I will overrule the objection.

You didn't finish your qestion.

Mr. Wilson: Will you read what I had started, please?

(The reporter read the question as follows:

"Question: Didn't I ask you to relate your conversation on the occasion of your visit to Mr. McLean? Answer: Yes, sir. Question: Didn't you tell me that——")

By Mr. Wilson:

Q. That Mr. McLean had told you that he had only gotten a 1.7 cent allowance from the Sun Oil Company in return for his agreement to reduce his margin of profit by 1.3 and to sell Sunoco gasoline at 19th and Pearl at a three cent reduction in price from 28.9 to 25.9? Isn't that the substance of what you told me last night?

[fol. 259] Mr. Henderson: I object to the question, Mr. Examiner. Here is a gentleman on the witness stand. The counsel for the Commission is trying to impeach his own witness. He is also trying to impeach his prior witness, Mr. McLean, and it seems to me, Mr. Examiner, that this becomes repetitious under 314B and we certainly object to the continuous trying to get an answer which the gentleman has already answered, and said it was done because of competition, and that Mr. McLean did it with that understanding. I object.

Mr. Wilson: Your Honor, I want to correct something in the record. I want to make this comment before you rule. There have been two or three occasions when there have been indications by the counsel for the respondent as to the testimony of Mr. McLean. Your Honor, excuse me for a moment. I put it down, but I can't find the citation.

Now, if Your Honor please, on Page 102, line 20, Mr. McLean testified as follows:

"Question: And it is that you didn't know about but which you testified was the reduction in profit that you were to take?

Answer: Yes, sir.

Question: And to sell their gasoline and as I understand your testimony to sell this gasoline at 25.9?

Answer: That is right.

Question: Now, was anything said to you, Mr. McLean, by any representative of the Sun Oil Company that you would continue to get these reductions in order to stay within one cent of Super Test?

[fol. 260] Answer: Nobody said that I would continue to get it.

Question: Did you continue to get it?

Answer: I did."

Now, let's go to another page. Turn to page 98.

"Question: Was there anything said to you about reducing your margin of profit?

Answer: Yes, my margin of profit was reduced.

Question: Did they say that to you?

Answer: Yes, sir."

I think that should settle once and for all as to the testimony of what Mr. McLean testified to on this record concerning the 1.3 allowance, absorption, reduction in profit.

Mr. Henderson: We will leave to your statement, to determine whether or not the statement he made is correct, all of his testimony.

I have a further objection at this time. I object to the continuing line of questioning by Commission's counsel, unless—I mean, I continue objections to it. What there should be attached to it is Commission's counsel going to

take the stand in connection with the type of question he is now asking. It is a most unusual procedure to ask these questions and then not knowing whether he himself is going to take the stand and try to refute this gentleman if his answer is no, and it seems to me continuous pressure is being brought upon the witness who is trying to tell the truth, and it should be followed up by counsel taking the stand.

[fol. 261] Hearing Examiner Piper: Obviously, I would assume obviously, he is not going to take the stand.

Mr. Henderson: Then, I certainly object to any investigation being conducted of this witness in the examination of this matter.

Hearing Examiner Piper: I think, it is quite clear to me the witness has taken him by surprise, and I stated before, I think the type of question may be used to refresh recollection or ability to remember.

I'll overrule the objection. You may answer the question.

Will you read it back, please?

(The reporter read the question as follows:

"Question: Didn't you tell me that Mr. McLean had told you that he had only gotten a 1.7 allowance from the Sun Oil Company in return for his agreement to reduce his margin of profit by 1:3 and to sell Sunoco gasoline at 19th and Pearl at a three cent reduction in price from 28.9? Isn't that the substance of what you told me last night?")

A. Well, we discussed the whole situation last night and I told you my story.

By Mr. Wilson:

Q. Isn't that the substance of it, as I summarized it in that question?

[fol. 262] Mr. Henderson: May he ask the question and not have counsel suggest to him what the answer is?

Mr. Wilson: May I ask a question, Mr. Henderson, and complete it prior to your breaking in and making an objection?

Mr. Henderson: I directed it to the Examiner.

Hearing Examiner Piper: No, I think you should permit him to finish their question. Now, if you have other objections state them and I'll rule on them.

Mr. Wilson: Yes.

The Witness: I believe I told you that the salesman was the one that told me he was absorbing 1.3 cents and making more money than he had ever made in his life.

By Mr. Wilson:

Q. Didn't you also say to me, Mr. Crabtree, that Mr. McLean explained to you in detail the circumstances under which he got the 1.7 of the three cent reduction that he was getting in his price?

A. Well, he, he told me that Sun Oil Company was giving him 1.7 cents and he was absorbing 1.3 cents.

Q. Didn't you say to me that Mr. McLean told you that he had to do that in order to get the allowance?

[fol. 263] A. No, sir.

Q. You didn't?

A. No, sir.

Q. Who was the salesman that you referred to, Mr. Crabtree?

A. Jack Brooks.

Q. How long was it after this visit of yours to Mr. McLean's that—well, strike that.

After your visit to Mr. McLean's did you at any time take up this matter with the Sun Oil Company?

A. Well, I was constantly aggravating them about it.

Q. Well, did you take it up with the Sun Oil Company?

A. Well, not in writing, no. On telephone.

Q. Did you call them on the phone?

A. On the phone, yes, sir.

Q. Did you say anything to any of the salesmen that called on you at your station?

A. I did.

Q. What did you say to them?

A. I told them they was ruining me, how in hell could they do it.

Q. Well, did they say anything, tell you anything at the time that they would do anything about it?

A. No, they sure didn't.

Q. Well, how long was it before Sun Oil Company gave you a price reduction, if they did?

A. They never did. I mean, other than above what they gave other dealers, except up when the gas war started.

Q. And when was that?

A. I don't know. February 18, I believe it was.

Q. I'll show you Commission's Exhibit 3-O, which is an invoice from Sun Oil Company, evidencing sales to [fol. 264] Bill Crabtree, and ask that you note the date thereon.

A. February 5.

Q. Now, what did Sun Oil Company sell you gasoline at on that date?

A. .094.

Q. That's considerably prior to February 18, isn't it?

A. Yes, well, I don't remember the dates the war started.

By Mr. Wilson:

Q. Now, directing your attention to Commission's Exhibit 3 (n) I will ask you to point out the date thereon and the price at which you paid for your gasoline?

A. February 3, 16.6.

Q. Well, on February 5th, gasoline that you purchased, you purchased it at a price of 9.4 cents of a gallon?

A. When the war started in there. I was going by my book on the retail prices. Evidently I have not marked up the retail price at that time.

. . . . . .

Q. Now, on that occasion, Mr. Crabtree, do you recall saying to Mr. Gravatte with respect to reduction in the gasoline price at 19th and Pearl that Sunoco agreed to cut or absorb 1.7 percent of the 3 cent price cut while Mr. McLean cut his mark up by 1.3 cent?

A. Yes, sir.

Q. Do you remember saying that to him?

A. Yes.

. . . . . .

[fol. 265] Hearing Examiner Piper: Oh, I thought the price showed on the invoice was a tank wagon price?

The Witness: No, the tank wagon price plus your rent.

Hearing Examiner Piper: Would that be true of the others, too, would you know?

The Witness: Yes, sir. Some of the others is different. It is according to the rent. Now, if you don't have all your collateral they will take an extra half cent out or tack an extra half cent on to your tank wagon price and it would be two cents more on account of it being in escrow, you see, for your collateral.

. . . . . .

Cross-examination.

By Mr. Henderson:

. . . . . .

[fol. 266] EDWARD H. BEARDSLEY, JR., was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

. . . . . .

Q. And how long have you been with the Sun Oil Company?

A. Continuously since June 1929.

Q. 1929?

A. That's correct.

Q. And how long have you been in the position of District Manager?

A. January 1, 1950.

. . . . . .

Q. Now, what salesmen, what are the names of the salesmen that you have working for you, under you, in Jacksonville?

A. Harry C. Harper, Harold L. Pepper, and Jack Brooks.

Q. And do those salesmen report to you from time to time as to the happenings?

A. Yes, sir.

Q. In their areas?

A. That's correct.

Q. They are assigned, are they not, to various areas?

A. Yes, sir.

[fol. 267] Q. Now, Mr. Beardsley, on page 152 of the record, Mr. Dietshe was asked this question, is it—"Offhand is the Sun Station at 10th and M Street here in Jacksonville within Mr. Brooks' area or Mr. Harper's area," and he answered, I can't tell you. It is within the province of the District Manager."

A. 10th and M, did you say?

Q. 10th and Main.

A. Oh, 10th and Main. We have no station at 10th and Main.

Q. At 10th and Main?

A. No, sir.

Q. Where was Mr. Peery's station?

A. 11th and Main, southeast corner.

Q. Now, salesman 7662 is Mr. Brooks?

A. Frankly, I don't know the salesmen by number. That's an accounting function. I have reference to that information but I don't handle them that way.

Q. Now, under date of 12-27-55, the station at 19th and Pearl, which is the station formerly operated by Mr. McLean, was put under the supervision of Mr. Brooks.

A. No, sir.

Q. Is that correct?

A. Not on December 27, 1955.

Q. Not on December 27?

A. No, sir.

Q. And when was that station placed under the supervision of Mr. Brooks?

A. January 1, 1956.

Q. And up until that time under whose jurisdiction was it?

A. On December 27 it was under Mr. Harry Harper's supervision.

[fol. 268] Q. Mr. Harry Harper?

A. Yes, sir.

. . . . . .

Q. Now, Mr. McLean testified on pages 91 and 92 of the record that he called you concerning the fact that Super Test was selling gasoline at a lower price than him, than he was, and that he talked to you about the matter. You recall that?

A. I recall him discussing it on several occasions, yes.

Q. When was the first time Mr. McLean said anything to you about that?

A. There were conversations relative to that condition back into August of 1955.

Q. When the station first opened?

A. Not when it first opened, but after their first deep cut.

Hearing Examiner Piper: You mean the Super Test?

The Witness: The Super Test deep cut, yes, sir.

By Mr. Wilson:

Q. As I understand previous testimony, Super Test operated there some two or three weeks prior to this Grand Opening they had?

A. That's approximately correct.

Q. After that grand opening they had, Mr. McLean called you?

A. I don't recall that it was a call. There were conversations because I had occasion to stop in the station periodically.

[fol. 269] Q. Now, what did you say to him on that occasion, if you recall?

A. There was no specific, beyond an awareness of the general effect it was having on his station. We assured him that we were aware and watching the situation in his and our best interests.

Q. Now, between the time of the Grand Opening, which was either on or around 26th or 27th day of August, according to Respondent's Exhibit 1 for identification, how many times do you, if you recall, did Mr. McLean call you or talk to you about that situation?

A. I recall two discussions. I wouldn't state the exact number.

By Mr. Wilson:

Q. Do you recall two discussions?

A. I recall two on two ocasions that I was in the station and that was a part of the general discussion that we had in the previous time I was in there.

. . . . . .

Well, had you arrived at a decision, Mr. Beardsley, sometime prior to December 27, 1955, at that time that some steps would have to been taken to alleviate Mr. McLean's position there?

A. No decision.

Q. No decision had been made?

A. No sir.

Q. Well, how did it happen—excuse me.

A. Well, I mean, we arrived at a decision that some steps would have to be taken.

Q. Yes.

A. I still say no decision.

[fol. 270] Q. Had you made any recommendations to Mr. Dietshe?

A. No recommendations at that time, no sir.

Q. No recommendations then were made by you prior to December 27, 1955?

A. That is correct.

Q. Now was it Mr. Harper or Mr. Brooks who told Mr. McLean on December 27, 1955, that he could have—that he would be allowed an adjustment if Super Test dropped again?

A. No one told Mr. McLean that to my knowledge.

Q. Mr. McLean so testified.

A. Well, I am sure at that time no one gave Mr. McLean a promise that if someone did something we would do something.

Q. Then, how did it happen that on December 27, 1955, Mr. McLean reduced his price from 28.9 to 25.9?

A. Well, Super Test had done something at that time.

Q. So right at that moment is when you decided to grant the 1.7 allowance to Mr. McLean?

A. No, sir.

Q. Well, now, you just testified a moment ago that you had not made any decision up until then.

A. That is right.

Q. So it had to be that time that you made the decision?

A. It was following that drop on December 27.

Q. But wasn't it on December 27, 1955, that he was granted a price allowance?

A. That is right, but it was following the drop.

Q. It was on that same day?

A. That is correct.

Q. So you made a decision prior to that time?

A. No, sir.

[fol. 271] Q. You made that decision then on that date?

A. I did not make a decision.

Q. Who made the decision?

A. The decision was made by Mr. Dietshe on the 27th after the conditions were reported to him.

Q. Well, then, had that been a topic of conversation between you and Mr. Dietshe prior thereto?

A. Yes, sir.

Q. And it had been agreed that if Super Test dropped again that you would take some action?

A. No, there was no agreement as to any specific thing being done prior to December the 27th.

Q. You just discussed it more or less and left it hanging up in the air, is that your testimony?

A. Yes, for a true answer to that question, yes. I don't think hanging up in the air is exactly the word I would use but we were constantly aware of the conditions that did exist and had been existing over a period of time.

Q. Didn't you even discuss the possibility of what might be done in the event that Super Test continued its downward price trend?

A. We recognized the fact that we would undoubtedly have to take some action if the condition continued.

Q. Well, to that extent you did arrive at some sort of decision?

A. A decision that there would have to be action taken if the condition continued, yes. Not a decision as to what would be done.

Q. Now, Mr. Beardsley, what was the date if you can—

I am trying to fix it—as to the general price war origin in Jacksonville?

A. In what year?

Q. Well, I am asking you, what was the date?

[fol. 272] A. Well, in 1956, it was approximately the middle of February.

Q. The middle of February?

A. Yes.

Q. Now, up until that time you were not granting any of your Sunoco Stations in Jacksonville an allowance other than the one at 19th and Pearl?

A. That is correct

* * * * * * *

Q. Now, in the record at 170, Mr. Dietshe testified that —testified in response to a question as to what in his opinion was the cause of the price war and his answer was that a group of majors suppliers dropped the price after which we followed suit.

Now, do you know why those major suppliers dropped their price?

A. I do not.

Q. Had they been prior to the middle of February selling on a price that was equal to that of Sunoco?

A. Approximately yes.

Q. Did the situation at 19th and Pearl have something to do with the majors reducing their price in the middle of February.

A. Not to my knowledge.

Q. It was never brought home to you that that was the cause?

A. No, sir, no indication for me to believe that.

Q. That could have been though, couldn't it?

A. It could have been, yes.

Hearing Examiner Piper: Was there any majors, since we have used the term here, filling stations at or near 19th and Pearl?

[fol. 273] The Witness: Several. To be explicit there is a Richfield on the corner of 20th as I recall.

Hearing Examiner Piper: And Pearl?

The Witness: 20th and Pearl on the southwest corner. 20th and Pearl on the southwest corner. A Pure on the

southwest corner of 21st and Pearl and a Sinclair on the northwest corner of 21st and Pearl. A Shell I believe on the corner of 22nd or 23rd and Pearl, and Atlantic. I can't name the corner. Two or three blocks north of that and south a Standard.

Hearing Examiner Piper: In other words, it was practically all of them that were represented in that vicinity?

The Witness: Nearly all of them were represented, yes.

By Mr. Wilson:

Q. Now, at that time, Mr. Beardsley, were those stations following the downward trend of prices of Super Test at 19th and Pearl or had they maintained their prices?

A. They had maintained their prices.

Q. Now, on page 174 of the record, Mr. Dietshe was asked this question: "What was the differential in the price between your station at 19th and Pearl and the Super Test Station on the day that it opened, do you know?" Answer: I have not the slightest idea."

[fol. 274] Do you know, Mr. Beardsley?

A. On the date Super Test Station opened?

Q. Yes.

A. Two cents as I recall.

Q. Now, I will ask you whether or not it is true that there is two cents and the two cents is the prevailing margin between the so-called independent gasoline and regular gasoline suppliers in this area?

A. No set pattern.

Q. Is it predominantly true?

A. At this time, yes.

Q. Hasn't it been that way for sometime?

A. I can only answer that question generally, that for —let me see, I was just trying to recall my dates on that —we will say that virtually all of '56 and at least a portion of '55 the large majority of the independents, the so-called postings were two cents less than the majors. Not for the entire period, however.

Q. In other words, it was only an isolated locality or instances that the margin is larger than two cents would you say?

A. Well, I would say isolated. There is a fair smattering of them right now.

By Mr. Wilson:

Q. Now, on page 176 of the record, Mr. Dietshe uses the phrase "voluntary allowances." Do you know what he means when he says "voluntary allowances"? What he means by that?

A. No, I can't explain his meaning of it.

Q. Well, at that time he was discussing the allowance that had been given to Mr. McLean?

A. Yes.

Q. He referred to it as a voluntary allowance.

A. Well, in that meaning it would mean price assistance in meeting competitive conditions.

[fol. 275] Q. Does that mean without any request from the station?

A. Oh, no, it has nothing, nothing——

Q. Did it mean that?

A. No, it wouldn't have that meaning, no, sir.

* * * * * * *

Q. How did it come about that Mr. McLean reduced his profit 1.3 cents per gallon at the same time he received a price allowance from Sun Oil Company of 1.7 cents per gallon on December 27, 1955?

A. Well, on the make up of the gross profit—I don't know whether I can answer this the way you mean, but Mr. McLean indicated to us that he wanted to post a price within 1 cent of the low cut which it happened to be 25.9, they having dropped to 24.9. We I received through Mr. Dietshe, authority to make a price adjustment to him in the amount of 1.7 cents which was to assist him in meeting that price and still provide him, well, I assume, a minimum livable margin of profit.

Now, the mechanics of the thing, in making the 1.7 price adjustment would in effect reduce our tank wagon profits by that amount and arriving at that new figure from the 25.9 which he had elected to post with a result of a three and a half cent spread, which was 1.3 less than the spread he had been operating under normal conditions. I hope, that's the best answer I can give you to that question.

* * * * * * *

Q. Do you know what he was operating on in terms of cents per gallon?

[fol. 276] A. It is very easy to figure out mathematically. There was a three and a half cent gross margin and while the surcharge on his invoice for the purpose of paying rent amounted to one and a half cents, that was only a collection method and not the net amount of his rent. Now, his rented amounted to $50.00 a month, plus one-half cent per gallon, which figures far less than a penny a gallon. You can figure that out mathematically on any month gallonage and his—well, you could call it gross profit minus rent, or gross after rent, would probably more nearly approximate, oh, I would say it would be a two and half cents a gallon.

Q. Was his gross margin 4.8?

A. On the normal market, yes, sir.

Q. Didn't he pay one and a half cents for rent?

A. We were collecting that cent and a half for rent. He wasn't paying that.

Q. That was being collected?

A. He was being credited at the end of the month for the difference between his collection and the actual rent.

Q. And he was also paying one-half cent of the so-called $2,000 deposit the operator is required to match?

A. That's right, which was his——

Q. In addition to that, he reduced his profit 1.3?

A. That's right.

Q. So, by simple mathematics he was actually operating on a one and one-half cent margin, wasn't he?

A. As of the date of the invoice, yes.

* * * * * * *

[fol. 277] Q. Now, Mr. Beardsley, you rather the Sun Oil Company, granted to Mr. McLean this 1.7 cents allowance. You testified gasoline was selling at Super Test for 24.9. Now, Mr. McLean was selling at 28.9 so by just using the 1.7 he would still have had to posted a price of 27.2 which would have been just a little under three cents over that of Super Test's posted price, isn't that correct?

A. Yes, sir. 3.—I won't figure it.

Hearing Examiner Piper: 2.3.

By Mr. Wilson:

Q. So, something further had to be done there to be competitive?

A. That's right.

Q. And did he say to you voluntarily, Mr. Beardsley, that he would absorb 1.3 percent of the profit? What I mean is, that he would reduce his profit by 1.3 in order to post this price of three cents reduction from 28.9 to 25.9?

A. No, sir, he didn't say that.

Q. Did you say to him at that time that in order for him to obtain the 1.7 cents allowance that he would be required to reduce his profit by 1.3?

A. No, sir.

Q. Well, he was asking you for relief, wasn't he?

A. That's correct.

Q. He could have dropped his price 1.3 or two cents or whatever he wanted to, prior thereto, could he not?

A. Yes, sir.

Q. On his own volition?

A. Yes, sir.

[fol. 278] Q. But he asked you for help?

A. That's correct.

Q. But you only were going to help him out about 50%, weren't you?

A. Partial. It was partial assistance.

Q. Well, you weren't actually reducing your price there then to meet the competition of Super Test, were you, except to the extent of 50% or 60%, maybe?

A. Well, it would be 1.7 out of three cents, whatever that amounted to.

Hearing Examiner Piper: It is between 50 and 60. 60 would be 1.8.

Mr. Wilson: Read the question.

(The reporter read the question as follows:

"Well, you weren't actually reducing your price there then to meet the competition of Super Test, were you, except to the extent of 50% or 60%, maybe?")

By Mr. Wilson:

Q. I asked you, or stated, you weren't meeting Super Test's competition?

Hearing Examiner Piper: Speak a little louder, Mr. Wilson, they can't hear you.

By Mr. Wilson:

Q. You weren't meeting the competition of Super Test except to the extent of 50 and 60% now, is that correct? [fol. 279] A. Well, we weren't as the company. We were only meeting the competition of Super Test through the dealer who asked for help.

Q. But in amounts, it was 50 to 60, yes, of the total reduction.

Q. It is customary for the Sun Oil Company when it desires to meet or assist one of its dealers to meet competition to only contribute between 50 and 60%.

A. I would say in depressed market conditions the amount of the decreases are not necessarily in the full amount of the drop, if I make myself clear on that.

Q. No, let's restrict it to situations such as you had at 19th and Pearl.

A. All right, sir.

Q. Is that the custom?

A. No, there's no given percentage.

Q. Now, how did you happen to arrive at 1.7?

A. On authority received from the regional office as to the assistance.

Q. Why not two cents, then?

A. I don't set the prices.

Q. I'm asking you though.

Mr. Henderson: Mr. Examiner, he has answered he doesn't set the prices.

The Witness: It's not within my province to determine the amount of assistance given at any particular price level.

* * * * * * *

[fol. 280] By Mr. Wilson:

Q. Is it customary for the Sun Oil Company to grant an allowance to service stations that are in competitive difficulties such as at 19th and Pearl, Mr. Beardsley?

A. Yes, sir.

Q. That has been the practice since you have been district manager?

A. It has been done. It is generally on a broader scale.

Q. Has that been done in the city of Jacksonville?

A. No, sir, not to my knowledge.

Q. At that time, was there corresponding reduction by the operator of the station?

A. Following the——

Q. On that same occasion when you granted the allowance, did the operator of that station reduce his profit?

A. I said there had been no previous ones in Jacksonville. I believe you asked had there been any in Jacksonville and I said no.

Q. Well, I am going to other areas now. You said there had been?

A. Yes, I am familiar with only one that I can recall at the moment.

Q. Did he reduce his margin of profit?

A. It was a group involved at that time and they did, yes. I don't recall the details.

Q. A number of stations?

A. Several stations.

Q. Was that in Tampa?

A. No, it was not. That is not within my area.

Q. But this was within your area?

A. Yes.

Q. Where was this?

[fol. 281] A. As I recall it was in the Orlando area.

Q. Orlando?

A. Yes, sir.

Q. Well, isn't it the policy of Sun Oil Company that a situation such as that to not require their operators to operate under less than a 3 cent margin?

A. As I recall the minimum is three and a half cents, sir.

Q. Well, your minimum is three and a half cents?

A. As I recall it.

Q. I am speaking of stations that you are assisting?

A. Yes, that is correct.

Q. You granted such assistance as will still enable them to operate under the margin of three and a half?

A. Minimum.

Q. A minimum of three and a half cents?

A. Yes, three and a half cents per gallon, yes, gross.

Q. Was that done in this instance?

A. Yes.

Q. Well, what happens in the event the relief you are giving isn't competitive?

A. I don't follow you.

Q. Well, you gave Mr.——

A. The relief we give is not competitive?

Q. Yes, it doesn't make for a competitive price, may be I should say it that way.

A. Well, as I understand the company's plan it provides for further adjustments as the dealers' needs are indicated and verified.

Q. Well, you had a situation at 19th and Pearl where an independent station was selling gasoline for 24.9?

[fol. 282] A. That is right.

Q. Yet you only gave Mr. McLean an allowance of 1.7. He would have to have sold that gasoline at 27.2 which as you admitted a moment ago would still not have been competitive with Super Test?

A. That is right.

Q. So he was compelled then under the circumstances to reduce his profit in order to remain competitive, is that correct?

A. So long as he desired to post the 25.9c price rather than the 27.2, he had to forego a portion of his profit, yes.

Q. Now, you didn't do that on occasions—strike that.

On the occasion that you gave all of your Sunoco dealers in this area competitive price allowances, had the Sun Oil Company decided that this entire trading area had become so involved that that was necessary?

Mr. Henderson: Mr. Examiner, I assume that the time that he is talking about is February 1956?

Mr. Wilson: Yes.

A. No, that is not the one to which I am referring. You are talking about a general reduction of market such as

February 1956. All dealers within the prescribed trading areas were given the same bind price. Now, does that answer your question or not?

Q. Now, was there an increase at that time in the competitive price allowance granted in the middle of February from 1.7 to something else?

[fol. 283] A. As I recall the retail price established by the dealers provided for a gross spread of 4 cents a gallon at that time starting with the middle of February and that pattern followed throughout that general price condition until the market returned to normal.

Q. Did that necessitate your increasing your competitive price allowance over and above 1.7?

A. This was not done. There was a distinct drop in the tankwagon price so it wouldn't be referred to as a competitive price allowance in those terms.

Q. Well, wasn't the allowance more than 1.7 at that time?

A. Let me see if I can answer that. There wasn't any allowance as such involved, Mr. Wilson. It was a definite reduction in the tank wagon price prevailing in the entire area which, when the dealers involved posted a price at that time as I recall within one cent of the independents provided for a 4 cent differential or a 4 cent spread between their bind price and the retail price that they established. Two separate methods of handling.

Q. Now, is that what is termed as a voluntary allowance?

A. No, that is reduction in tank wagon.

Q. Well, isn't that a voluntary allowance?

A. Well, it could be so termed, I presume. It is a price reduction or an allowance of a special price to permit the dealer being competitive.

Q. I direct your attention to Commission's Exhibit 14 which is a statement by Willard W. Wright, General Sales Manager of Sun Oil Company, appearing on page 11 on 14-K where Mr. Wright says: "This procedure of granting a voluntary allowance under the tank wagon price to all Sunoco dealers in the trading area affected by severe price competition had been repeatedly invoked by us throughout [fol. 284] the subsequent years of New Jersey price fluctuation and elsewhere. The goal at the time depending on circumstances has been to assure the dealers a 3 to 4 cent margin. A dealer is not required to reduce his price to be

eligible to receive this voluntary allowance if he is located in a trading area which we have decided is under price competition injurious to Sunoco dealers if not relieved."

Now, so that is considered as a voluntary allowance?

A. Oh, I see the differentiation now. I think I have got to first say that a tank wagon area in which a definite selling price is established to all dealers may encompass a very large area. Only when a group of dealers within that large area are so affected as to require help from the company does the voluntary allowance come into the picture. The tank wagon is not changed in those cases, but that dealer or group of dealers are given a voluntary allowance to permit them meeting competitive conditions within their own particular area, but not applying to the entire tank wagon circuit.

Hearing Examiner Piper: Well, was this allowance in February applied to the entire circuit?

The Witness: It was not a voluntary allowance in February. It was merely a reduction in the tank wagon in the entire Jacksonville area.

[fol. 285] Hearing Examiner Piper: Well, was that the entire tank wagon circuit that you were referring to?

The Witness: The entire tank wagon circuit, yes, sir.

Q. Mr. Beardsley, beginning at page 102 of the record, line 20, Mr. McLean testified that he was to take a reduction in the profits of 1.3 cents per gallon and sell the gasoline at 25.9 cents per gallon. Now, turning to page 98 will be found that he testified that something was said to him about reducing his margin of profit and that it was reduced.

Now, I will show this to you so that you may read it.

A. That is right. And, in that connection, after Mr. McLean had indicated his desire to post a price, which was one cent above Super Test and I obtained through management approval for that request, I passed it on to Mr. Harper, the fact that we would be able to give him this allowance of 1.7 cents but that he should be sure in posting the 25.9 that with our 1.7 allowance he would be limited to a total gross profit of 3.5 cents so long as he posted that particular price.

I mean, it was, I think, an obligation on our part to be sure that he understood his gross per-gallon would be

reduced by that amount so long as he felt it necessary to post the 25.9.

Mr. Wilson: I would appreciate your reading that back to me now.

[fol. 286] (Answer read as follows:

"Answer: That is right. And, in that connection, after Mr. McLean had indicated his desire to post a price which was one cent above Super Test and I obtained through management approval for that request, I passed it on to Mr. Harper, the fact that we would be able to give him this allowance of 1.7 cents, but that he should be sure in posting the 25.9 that with our 1.7 allowance he would be limited to a total gross profit of 3.5 cents so long as he posted that particular price.

"I mean, it was, I think, an obligation on our part to be sure that he understood his gross per gallon would be reduced by that amount so long as he felt it was necessary to post the 25.9.")

By Mr. Wilson:

Q. He wouldn't have been able to have reduced his price to equal that of Super Test at that time because it would have fallen below his 3.5 cent margin, Mr. Beardsley?

A. I don't recall that that was even considered.

Q. Well, you wouldn't have permitted it as far as your company is concerned anyway, would you?

A. I would neither have approved it or permitted it, let me say. Such didn't enter into consideration, however.

Q. When was it that you and Mr. Dietshe and Mr. McLean went to Philadelphia, Mr. Beardsley? If I say January 7th, would that be about——

A. Well, that's close.

Q. On or about that time?

A. It's close. I don't remember the exact—January 7th.

[fol. 287] Hearing Examiner Piper: 1957 you are talking about?

The Witness: Yes.

By Mr. Wilson:

Q. Did you ask Mr. McLean to go to Philadelphia with you?

A. I did.

Q. Did you pay his way, the Sun Oil Company pay his way?

A. That's correct.

Q. And you also paid the amount of time he lost from his work?

A. That's correct.

Q. Now, was he— you had a meeting up there as I understand it, Mr. Beardsley?

A. Conference.

Q. Conference.

A. It wasn't a meeting as such.

Q. At that time, wasn't he asked whether or not he had signed an Agreement with the Sun Oil Company as to the 1.3c profit reduction that he had made?

A. Was he asked that he had signed an Agreement with the Sun Oil Company as to the ——?

Q. Reductions of the 1.3c profit.

A. Not to my recollection.

Q. You don't recall?

A. No, I don't recall that he was asked such a question. No, sir.

Q. Let me ask you this, wasn't he required at the time he reduced his profit to 1.3¢ to make out some kind of a paper request or something like that to the Sun Oil Company?

[fol. 288] A. As a confirmation of his request for help, yes, sir, after he had advised us of the price he wanted to post and of the conditions necessitating it, and following my getting from Management the price on which we could help him, there was a confirming paper, letter, signed by him and addressed to the Company stating his necessity for meeting those prices, and as well, outlining the conditions which brought it about.

* * * * * * *

Mr. Wilson: Let the record show that I requested marking for identification a letter addressed to Sun Oil Company under date of December 27, 1955, by Gilbert V. McLean.

By Mr. Wilson:

Q. Mr. Beardsley, I note that it says here, "In order to meet competition it will be necessary for me to sell Blue Sunoco gasoline at a retailed service station price that is 1.8c per gallon above the posted dealer tank wagon price at which I now purchase same under my Dealer's Agreement.

Can you explain for the record as to how you could take that and arrive at the price of 25.9 that he posted?

A. Yes, sir. He has indicated that Super Test is posting a price including all taxes of 24.9 retail, and inasmuch as he figures if necessary to post a price of 25.9, One Cent above the Super Test posting, that 25.9 is 1.8c above the 24.1 tank wagon price prevailing in Jacksonville at that time.

[fol. 289], Mr. Wilson: Your Honor please, I offer this in evidence. I offer Commission Exhibit 26 for identification in evidence.

Hearing Examiner Piper: Do you waive identification? It hasn't been identified. All right. Do you have any objection to it?

Mr. Henderson: (Shook his head negatively.)

Hearing Examiner Piper: All right. Commission's Exhibit 26 is received.

. . . . . .

Q. Mr. Beardsley, didn't you or your salesmen receive complaints from other Sunoco Dealers about the price allowance given to Mr. McLean within just a few days after the 27th of December, 1955?

A. Now, not a few days.

Q. How long was it before they started coming in?

A. Other than this case, let's see, that was Mr. McClung. I would estimate that it was three to four weeks.

Q. Three to four weeks?

A. Yes, three to four weeks. I am talking about reports that I received.

Q. Well, what about Mr. Crabtree, he didn't wait three or four weeks, did he?

A. I don't recall having received a complaint from any of the other dealers prior to that time.

Q. Other than Mr. McClung?
A. Other than McClung.

. . . . . .

[fol. 290] Hearing Examiner Piper: If I followed your testimony correctly, on December 27th, 1955, and immediately prior thereto, the general price differential in the Jacksonville area between the major—between the majors regular gas and the so-called independents was two cents a gallon?

The Witness: Yes, sir.

. . . . . .

Hearing Examiner Piper: And prior to the cut by Super Test on December 27, when they dropped their price down lower than it had been, the difference between Mr. McLean's price and their price was two cents a gallon?

The Witness: That is correct.

Hearing Examiner Piper: And then they dropped it still further on December 27th?

The Witness: Yes, sir.

Hearing Examiner Piper: That is with the exception of the so-called week end sales that they had?

The Witness: Yes, sir.

[fol. 291] Hearing Examiner Piper: Which was below the two-cent differential?

The Witness: Yes, sir.

Hearing Examiner Piper: But nothing had been done about them until the week-ends so to speak?

The Witness: That is correct.

Hearing Examiner Piper: Now, I think you testified in answer to one of Mr. Wilson's questions as to why or what the reason might be for the usual price differential in most cases of two cents between the majors' regular gas and the independents was that at that time they were, at that differential, they were competitive?

The Witness: I don't follow the question.

Hearing Examiner Piper: Something to that effect. In any event, it must have been the feeling of the operators that during the normal period when there wasn't any

price cutting going on a difference of two cents between the independent price and their price still left them competitive; would you say that is a fair statement?

The Witness: That it was the apparent feelings of the operators?

[fol. 292] Hearing Examiner Piper: Because you refer to that as the normal yourself.

The Witness: At that time.

Hearing Examiner Piper: And until Super Test went below that figure, or that differential, there was no apparent problem at the 19th and Pearl Street station?

The Witness: Yes, and that was precipitated by the two-cent differential. That is what I say.

Hearing Examiner Piper: Now, as I understand the tenor of your testimony it is that because the Super Test station across the street at 19th and Pearl, if I remember correctly, dropped its price to 24.9, that put McLean in trouble competitively, and he felt that it was necessary to get some help from the company in order to meet that competition?

The Witness: That is part of it. There were previous extended drops, I said, which had aggravated the situation.

Hearing Examiner Piper: But that was the precipitation about what we were talking about here?

The Witness: Yes, sir.

[fol. 293] Hearing Examiner Piper: And as a result of that he contacted the company; he had contacted them, and then he contacted them again and a decision was reached to give him this allowance in order to enable him to meet competition and I think you testified that he decided that 25.9 was the price necessary for him to post in order to meet this competition?

The Witness: He decided that one cent above their posted price, which in this case was 25.9.

Hearing Examiner Piper: Yes, and that gets me right down to the question I am interested in an answer to.

If under normal conditions and all the time prior thereto the two-cent differential was sufficient for competitive purposes, why did he want to cut his price within only one cent of the competition?

The Witness: Well, I can't answer as to his reasons for that, but that pattern had, however followed on previous depressed markets.

. . . . . .

Hearing Examiner Piper: But you still have not answered my question: Why was a decision reached to grant an allowance to Mr. McLean which would permit him to retain a gross profit of 3.5 cents a gallon if he posted his price at 25.9 when in so doing it would bring him within one cent of his competitor across the street, if prior there-[fol. 294] to and subsequently thereto, two cents was considered a competitive margin?

The Witness: The only thing I can say on that in my experience from sub-normal price situations and Mr. McLean had been aware of these facts; I am sure that in a sub-normal market the pattern had been for the majors to post prices which would have been within one cent of independents.

Hearing Examiner Piper: What do you mean when you say the sub-normal?

The Witness: A price war.

Hearing Examiner Piper: Would you call this a price war, one station?

The Witness: Insofar as he was concerned I would assume it was.

Hearing Examiner Piper: Well, sure, to him it was a price war, I am sure, but I think you said before that in a price war situation where it was necessary to help your dealers, you reduced the tank wagon price where the problem is general?

The Witness: That is correct.

Hearing Examiner Piper: And you didn't call it an allowance?

[fol. 295] The Witness: That is true.

Hearing Examiner Piper: You refer to that as a general price war?

The Witness: That is correct.

Hearing Examiner Piper: To distinguish it from their situation in answer to Mr. Wilson's question, this is not what you would call a general price war? It might have been the start of one but at this point you couldn't call

it a price war in the ordinary sense that you have been using the term, could you?

The Witness: Well, it was.

Hearing Examiner Piper: But it was very localized anyhow?

The Witness: Well, that is true.

Hearing Examiner Piper: One competitor had dropped their price?

The Witness: And only one station was involved insofar as we were concerned.

Hearing Examiner Piper: Well, then, the only explanation then as I understand it is that in a price war situa-[fol. 296] tion it was the practice in fighting against such competition to come down within one cent?

The Witness: Well, I don't know——

Hearing Examiner Piper: Well, competing or whatever you would call it?

The Witness: Yes, normally I think it would be revealed that that had been the practice.

Hearing Examiner Piper: Well, as I understand it did you make a recommendation for this allowance to your superiors?

The Witness: Yes. Well, I made recommendations based on McLean's expressions.

Hearing Examiner Piper: Based on the facts, and did you recommend 1.7?

The Witness: No.

Hearing Examiner Piper: You just gave them the facts?

The Witness: I just gave them the facts.

Hearing Examiner Piper: So the conclusion was reached by somebody about you to grant him one point seven? [fol. 297] The Witness: The policy set forth by the company provided for that allowance under the circumstances.

Hearing Examiner Piper: Because of him picking the 25.9, 1.7 was the——

The Witness: The amount of the adjustment.

Hearing Examiner Piper: If you had not given him that much he wouldn't have had 3.5 cents?

The Witness: That is true.

Hearing Examiner Piper: Well, I suppose you wouldn't know but in arriving at that decision, would not some consideration be given to the fact that normal competi-

tion existed between independents and your gasoline when the price differential did not exceed two cents; it is almost the same one I asked before?

In other words, put it another way: if you had allowed him .7 discount instead of 1.7 he could have reduced his price and made the three and a half cents a gallon to 26.9?

The Witness: Yes, that is right.

Hearing Examiner Piper: Which would have brought him to within two cents of the station across the street which was the difference all along?

[fol. 298] The Witness: That is true.

Hearing Examiner Piper: Before this price cut but for some reason or another he went beyond that and he came down to a cent?

The Witness: That is right.

Hearing Examiner Piper: And you have explained as far as you know what the reason is?

The Witness: Yes.

Hearing Examiner Piper: And you said that the majors normally came within a cent during a price war?

The Witness: The majors postings, I think, are generally within a cent. That has been the pattern. I don't think there is any difference.

Hearing Examiner Piper: During a price war but in the normal times it is two cents?

The Witness: It had been for the previous period.

Hearing Examiner Piper: In general?

[fol. 299] The Witness: Yes, sir.

Hearing Examiner Piper: But there are scattered differences?

The Witness: At that time only in limiting it to a relatively short period before this December 27th.

Hearing Examiner Piper: Well, as I understand your testimony then, if the company policy is to make certain that an operator grosses at least three and one-half cents a gallon, 1.7 was an absolute requisite under company policy to permit him to gross just that and no more?

The Witness: No more, so long as he posted this same price.

Hearing Examiner Piper: Yes, based on his decision.

The Witness: Yes, sir.

Hearing Examiner Piper: To post that price, to sell at that price?

The Witness: Yes, that's right. Figured out mathematically.

* * * * * * *

By Mr. Wilson:

* * * * * * *

[fol. 300] Q. Isn't it true that your one percent differential that you tried to maintain, as was attempted to be maintained in this instance here, was because this was an independent competitor rather than one of the majors?

A. Repeat that, please.

(The reporter read the question as follows:

"Question: Isn't it true that your one cent differential that you tried to maintain, as was attempted to be maintained in this instance here, was because this was an independent competitor rather than one of the majors?")

Hearing Examiner Piper: He means one cent.

Mr. Henderson: One cent.

The Witness: One cent, I understand that. I guess the answer to that must be yes.

* * * * * * *

Q. But it is customary, isn't it, in these price wars in some instances to attempt to stay within one cent?

A. That's been the experience.

* * * * * * *

[fol. 301] CLAIR RUSSELL WINNING, was thereupon called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Young:

. . . . . .

Q. Mr. Winning, what business are you engaged in in Jacksonville?

A. Service Station business.

Q. And what type of service station do you operate?

A. Sunoco. Sunoco.

Q. Prior to your coming to Florida what business were you engaged in?

A. Some thing in Pennsylvania.

Q. In where? Pennsylvania?

A. That's right.

Q. Do you recall just when you began operating your Sunoco station in Jacksonville?

A. On July 6, 1955.

. . . . . .

Q. Will you state where your station is located here in Jacksonville?

A. 8028 Lemturner, in Jacksonville.

Q. Will you state where that is located in relation to the Sun Oil Company Station being operated at 19th and Pearl Street?

A. Jacksonville?

[fol. 302] A. Well, I guess it's about two or three miles straight north on 115.

Q. Two or three miles?

A. North, going north.

Q. Is it on a thoroughfare, by any chance, between two stations?

A. Well, it's a main traveling road from Lake Forest down town.

Q. Where do you get most of your business at your service station? Where do most of your customers come from?

A. Mostly locally, Lake Forest and out toward Osceola Forest. In that direction.

Q. And do most of these customers——

A. Mostly local.

Q. Work downtown Jacksonville, or do you know?

A. That's right, they go by the station.

* * * * * * * *

Mr. Henderson: Now, Mr. Winning—I think that is your name—what hour do you keep that station open?

The Witness: 6:00 in the morning until 10:00 at night.

* * * * * * * *

Q. Mr. Winning, could you state at approximately what time you heard of the situation at 19th and Pearl Street?

A. It was in the last part of December sometime. I don't know. Right around Christmas.

[fol. 303] By Mr. Young:

Q. And how did you hear about the price situation?

A. Well, one of my customers come by and said that they could get it cheaper on Pearl Street than I could sell it to them for.

Q. And did your customer at that time go down to Pearl Street and buy their gasoline?

A. That is right.

* * * * * * * *

Q. Mr. Winning, do you happen to know the names and addresses of any specific customers that you had that went down to the 19th and Pearl Street station to buy gasoline rather than buy it at your place?

A. Well, I have got a lot of them up there, but most of them don't care to get involved, although I have several names that said they would be glad to testify.

Hearing Examiner: Well, I don't think he is asking if any of them will testify.

The Witness: Yes, I know a few.

By Mr. Young:

Q. Will you state for the record some of the people that you know specifically that went down to 19th and Pearl Streets?

A. Well, I got four on here. I got Bill Yeomans——

Mr. Henderson: Now, Mr. Examiner, I object to this line of testimony unless this is considered state of mind [fol. 304] evidence and is not taken for the truth because it certainly is not—it is very clearly someone speaking to him.

Mr. Young: That is what I meant it to be. I think the day before yesterday this was brought up when some names were given and it is not brought out for the truth of the matter, it is merely as he said state of mind evidence.

Mr. Henderson: So that the record may be straight now, I am not conscious that any names have been given, but however, that is my objection.

Hearing Examiner Piper: Well, I don't recall. I recall an incident when there was that distinction, but I don't know whether it was the same thing. Of what relevancy is it that he was so told as distinguished from the fact that they did do so?

Mr. Young: Well, as I recall, when it came up initially, Mr. Henderson requested that if we were going to refer to these people we could come forth with names and he has a few names now, so I thought I would put them in the record.

Hearing Examiner Piper: Well, this will not prove that they did buy their gasoline there. It will only prove that they told Mr. Winning that they did or were planning to. Is it relevant to show that?

[fol. 305] Mr. Young: I think is it, yes.

Hearing Examiner Piper: All right, it is received for that purpose then, but not to prove the truth of the matter as stated. Go ahead.

A. (Continued) Bill Yeomans, 1739 Stafford Road. Normal Moorehouse, 1869 Forest Hills Road. Walter Hendricks, Winn-Dixie Food Store. R. E. Dearen, 7853 Caxton Circle.

Hearing Examiner Piper: Are those in Jacksonville?

The Witness: That is right. They are all in Lake Forrest.

By Mr. Young:

Q. And Lake Forrest is part of Jacksonville?

A. That is right. These four were all definite customers of mine that all left and went down to Pearl Street and bought their gas.

Hearing Examiner Piper: That is what they told you?

The Witness: I know because I lost their business.

Hearing Examiner Piper: Well, they didn't buy it from you any more?

[fol 306] The Witness: And for about a month I missed them and about a month later I asked them where they had been and they said that they bought all their gas down at 19th and Pearl Streets.

Mr. Henderson: Your Honor, I made my objection to this.

Hearing Examiner Piper: It is not admissible to prove the truth of what they said. Of course, he can testify and has that they didn't buy it from him. He knows of that of his own knowledge and he can testify that they told him that if that is relevant.

By Mr. Young:

Q. At approximately what time did you say you became aware of the price situation at 19th and Pearl?

A. I don't know exactly. Around the last of December sometime.

. . . . . .

Hearing Examiner: Daily averages for the week of December.

Mr. Henderson: Oh, I see.

By Mr. Young:

Q. I now hand you Commission's Exhibit 27-A and ask you to read the daily average for the weeks of January, 1956?

[fol. 307] A. 686 gallons, 647.5 gallons, 667 gallons, 635 gallons.

Q. Now, Mr. Winning, I have not totaled these up, but I note that they are substantially the same. In other words,

they don't indicate any excessive drop in gallonage in January?

A. That is right.

Q. Now, you testified that you became aware of the situation at 19th and Pearl Streets about the latter part of December. To what, if anything, do you attribut the fact that your records show no drop in gallonage?

Hearing Examiner Piper: Yes, I think it was.

Mr. Young: I merely showed him these to refresh his memory as to that period of time.

By Mr. Young:

Q. Now, can you answer the question?

A. Well, I just worked that much harder, and tried to please the people that much better to hold them on to keep them from going down there, that is all.

Mr. Henderson: I ask that it be stricken.

Mr. Young: I think it is responsive.

[fol. 308] Mr. Henderson: That is conjecture and conclusion and highly speculative. There are hundreds of gasoline stations in the City of Jacksonville.

Mr. Young: I meant to say that I thought his answer was responsive to my question.

Hearing Examiner Piper: It was. That is not the basis for the objection.

Well, this is sort of a dual problem. I think the answer should remain to show what the witness says he did as a conclusion that that is the reason that the gallons didn't drop. It is of course, objectionable and is a conclusion. For that purpose I will not receive it, but I will let it stand to show the fact, as he testified, that he worked hard and tried to improve his business during that period, but as to what caused the gallonage to stay up is strictly speculative as I see it.

Mr. Wilson: Your Honor, you are not meaning by that statement to foreclose the argument that if somebody gets out and works a little bit harder and he has a pretty good chance of doing a little better than someone that sits around and doesn't, are you?

Hearing Examiner Piper: No, I wouldn't assume that you would have to argue that. I think normally anybody that works harder is better off than somebody that doesn't. [fol. 309] Of course, there are exceptions to that, too. Some people have it fall into their lap.

By Mr. Young:

Q. Mr. Winning, I show you again Commission's Exhibit 27-A and I notice on here for the week of February 12th through 18th, 1956, there appears a cross mark on the date marked Thursday. Now, will you read the gallonage for Wednesday of that week into the record, and then will you read the gallonage for Thursday of that week into the record?

A. Wednesday, 410 gallons. Thursday, 903 gallons.

Q. Now, will you state for the record to what you attribute that rise in gallonage on those two days?

A. The 400 gallon day was the day I had my price up and the other price was done on Pearl Street, and then the 903 gallon day, that was the day I was authorized to cope with the same price that he had down there.

Hearing Examiner Piper: What price was that?

The Witness: The same price that the Pearl Street Station was posting.

. . . . . .

Q. How were you notified concerning the allowance to be given you?

A. I was called over the telephone by Sun Oil Company.

[fol. 310] Hearing Examiner Piper: And what allowance was give you, do you remember that?

The Witness: Well, I was told at that particular time what to drop the price to, to compete with that one down there.

. . . . . .

Cross-examination.

By Mr. Henderson:

Q. Mr. Winning, is that the way you pronounce your name?

A. That is right.

Q. You were familiar with the operation of the gasoline station, having operated a station of your own in Johnstown District of the Sun Oil Company?

A. That is true.

Q. From 1947 to 1954?

A. That is right.

Q. And you were born in Nanty Glow, Pennsylvania?

A. That is right, that is in Cambria County.

Q. And that is in Pennsylvania?

A. That is right.

Q. Now, if you will help me just a little bit, did you work every day the hours that you have already testified to?

A. Yes, sir.

Q. What help did you have at the time of your testimony, going from July, 1955, say, to the middle of 1956?

A. I had one helper.

[fol. 311] Q. And what were the hours of the helper?

A. He come on about 9:00 and left about 7:00 or 8:00 o'clock.

Q. So this station you operated there at Lem Turner Road during all this time?

A. Yes, sir.

Q. You had the one helper and what was his name, Mr. Winning?

A. Warren Settle.

Q. And is he still with you?

A. No, sir, he went back home.

Q. Where is his home?

A. Pennsylvania.

Q. Well, now, in the week of the 20th day of December, 1955, were you not closed two days during that week, both the 25th and the 26th of December?

A. No, just on the 25th.

Q. You were not closed two days?

A. No, sir. That I can remember.

Hearing Examiner Piper: Are you talking about '55?

Mr. Henderson: '55, December.

Hearing Examiner Piper: No, you said February '55, and that was long before this case. I wondered——

Mr. Henderson: Now, this is the case, December 27th, 1955. My friend says February.

[fol. 312] Hearing Examiner Piper: All right.

By Mr. Henderson:

Q. Again, looking at your records, do they start on Sunday and run to Sunday?

A. That is right.

Q. So the 12th day of December was Sunday and the 24th day of December was Saturday?

Hearing Examiner Piper: Well, we can settle that. I have a '55 calendar.

No use guessing about it. The 12th day was Monday and the 11th was Sunday.

Mr. Henderson: What was the 18th?

Hearing Examiner Piper: Sunday.

By Mr. Henderson:

Q. So as I said before the 18th was Sunday and the 24th was Saturday and that was for the week of the 18th of December to the 24th of December, in which you show here the total gallonage of 2360 gallons? You can see for your own self from your records.

A. Uh-huh (indicating the affirmative).

Q. Is that right?

A. That is right.

Q. And that is during the months from November through to that time, that was the smallest gallonage that you had up to the 24th day of December of any week?

A. That is right.

[fol. 313] By Mr. Henderson:

Q. That's right, is it not? Now, during the first week of January were you closed one day at that time?

A. That's right. New Year's Day.

Q. New Year's Day. May I see that calendar? All

right, that was on a Sunday you were closed, being the first of January, 1956?

A. That's right.

Q. Actually, looking again at your own record, your gallonage was less in the week of December 18 to the 24th when you worked an entire week, than it was the first week in January when you worked only six days, is that not correct?

A. That's right; for that one particular week.

Q. And is it not a fact that at all times from the 27th of January up to, say, the first of March your gasoline sales increased on your weekly average? At least, that's what your record shows.

A. From January to March? No, some weeks it's up and some weeks it's down there.

Q. But anyway it was larger at all times than the last, the week of December 28th to December 24th—to December 18th to 24th?

A. That's right.

Q. The answer to that is yes, is it not?

A. Yes.

Q. The answer is yes, is that right, Mr. Winning?

A. Yes, that's right.

* * * * * * *

[fol. 314] BEFORE FEDERAL TRADE COMMISSION

Court House No. 2
U. S. Court House
Philadelphia, Pennsylvania

Monday, May 13, 1957.

Met, pursuant to adjournment and notice, at 1:00 o'clock p.m.

Before Robert L. Piper, Hearing Examiner.

APPEARANCES:

Rufus E. Wilson and Ross D. Young, Attorneys for the Federal Trade Commission.

Joseph W. Henderson, 1910 Packard Building, Philadelphia, Pennsylvania.

Leonard L. Zimmerglick, 1826 Jefferson Place, N. W., Washington, D. C.

J. Blair Moffett, 1608 Walnut Street, Philadelphia, Pennsylvania; and Henry R. Frye, 1608 Walnut Street, Philadelphia, Pennsylvania Attorneys for the Respondent.

* * * * * * *

ROBERT H. GRAVATTE, JR., was called as a witness for the Commission and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wilson:

Q. Will you state your full name for the record, Mr. Gravette?

[fol. 315] A. Robert H. Gravatte, Jr.

Q. Where are you employed?

A. Federal Trade Commission.

Q. How long have you been there?

A. Since November 1, 1948.

Q. In what capacity?

A. Attorney, Washington branch office, that is the field office.

Q. What are your duties, Mr. Gravatte?

A. I do field work; that is, I investigate the cases that are assigned to me by interviewing parties and obtaining documents and so forth.

Q. Now, in connection with your official duties have you ever had occasion to make any investigation concerning the Sun Oil Company?

A. Yes.

Q. Did that occasion take you to Jacksonville, Florida?

A. It did.

Q. You made various interviews in and around Jacksonville, Florida?

A. I did.

Q. During the course of that interview did you have occasion to have a conversation with one Gilbert P. McLean?

A. I did.

Q. What did you discuss with Mr. McLean?

A. I discussed the prices that he was receiving from Sun Oil Company and the prices that he was selling his gasoline for at his service station in Jacksonville.

Q. What kind of a station was Mr. McLean operating?

A. It was a small station at the corner of 19th and Pearl Streets. He was a lessee of Sun at that station.

[fol. 316] Q. At 19th and Pearl?

A. That is right.

. . . . . .

The Witness: The date of my conversation with Mr. McLean was March 8, 1956.

. . . . . .

Hearing Examiner Piper: All right. Tell us what Mr. McLean told you about prices and do not preface it with his statement.

. . . . . .

Hearing Examiner Piper: Answer the question.

The Witness: Mr. McLean said to me that in November and early December, 1956, he was selling gasoline in his leased station for 28.9 cents.

Hearing Examiner Piper: In '55?

The Witness: '55. He was losing money doing so, because he was being undersold by two adjacent stations of other oil companies. He mentioned to the Sun representatives in Jacksonville on several occasions that he was losing money at his station and he asked that Sun do something about the matter. He stated that he had made inquiries [fol. 317] of Sun on a number of occasions in November and early December of 1955, but that he had had no such conversation for the week immediately prior to December 25, 1955.

December 25 was a holiday. It was a Sunday and so was December 26, which was a Monday. Mr. McLean stated that when he reopened his gasoline station Tuesday morning, December 27, the telephone rang. Mr. McLean stated that he answered the phone and that it was Sun. I specifically questioned Mr. McLean who he was talking to and he could not recall who the party on the other end of the phone was. He merely identified the party as Sun.

Mr. McLean said that over the telephone Sun said to him, "If you lower the price of gasoline in your station by 3 cents a gallon, we will give you a promotional allowance of 1.7 cents a gallon."

Mr. McLean told me that he told Sun that he was agreeable to this arrangement and that was the end of the telephone conversation.

By Mr. Wilson:

Q. Mr. Gravatte, did he say anything to you about whether he accepted that and posted the 3-cent lower price?

A. He said that he accepted the offer made to him over the telephone and he immediately on the same day started selling his gasoline for 3 cents less, which would have been 25.9 cents.

Q. Was there a price war going on in Jacksonville at that time, Mr. Gravatte, if you know?

A. There was no general price war going on in Jacksonville at that time?

Q. Had there been one?

[fol. 318] A. I heard reference to one nearly a year before that time.

Q. Was there a price war going on at the time, which I understand was in March or February of 1956, on the occasion of your interview with Mr. McLean?

. . . . . .

A. There was a price war going on in March, 1956.

Q. Now, Mr. Gravatte, on the occasion of your trip to Jacksonville did you ever have occasion to interview Mr. Maximilian Dietsche?

A. I did.

Q. Did you have any conversation with Mr. Dietsche about the so-called price war?

A. I did.

Q. What did Mr. Dietsche say, if anything, to you about that?

. . . . . .

The Witness: Mr. Dietsche said to me on March 6, 1956, that in his opinion the price war which was then going on had been caused by the fact that the independent gasoline dealers in the State of Florida had far too high a percentage of the market, a much higher percentage than they had in other areas throughout the United States.

. . . . . .

Cross-examination.

By Mr. Henderson:

. . . . . .

[fol. 319] Q. How many people have you talked to since March 6, 1956, in reference to investigations for the Federal Trade Commission?

A. The number would be in the thousands.

Q. Have you got a written memorandum here of your conversation with Mr. Dietsche which took place?

A. I am confused by the word "memorandum."

Q. Did you——

A. I have something in writing.

Q. You have something in writing. What do you call it?

A. A field report.

Q. And do you have it with you?

A. It is in the Courtroom.

Q. And did you examine it before taking the stand here today?

A. I did.

Q. When, today?

A. Yes.

Q. And you say in the meantime you had been in touch with thousands of witnesses?

A. Not witnesses, people.

Q. People. You had conversations with thousands of people?

A. Yes.

Q. Now, is your testimony being based upon this memorandum or field notes that you are speaking of?

A. Much of my testimony is, but I also have a clear recollection both of my conversation with Mr. McLean and with Mr. Dietsche.

Q. And would you please get your field notes and let us see them?

[fol. 320] Mr. Wilson: Your Honor please, I object. The field reports of attorney are not admissible, and furthermore even though those are perhaps carbon copies of a report, the Commission feels they are confidential and has so held. As long as he has not used them on the witness stand to refresh his recollection they may not be produced.

Mr. Henderson: Mr. Examiner, I do not want to take a great deal of time on this because we have argued it a great many times, and the last was in this Courtroom involving the United States Government in connection with FBI reports, and the FBI reports were made available to us. This witness has testified that he did use these reports to refresh his memory and some of it he recalls distinctly and some he used the reports for refreshing his recollection. I think on the basis of the testimony that we are entitled to see the reports under those circumstances.

Hearing Examiner Piper: I do not think there is any question about that as the general rule, but then on the other hand they come under the rule that they are confidential Government documents and the Commission prevents their disclosure. I am sure you are entitled to them as a matter of cross-examination, but I know that they are confidential documents and the Commission's rule prevents their disclosure.

Mr. Henderson: True, but the Courts have not followed completely the rules of the Departments, and you will find one of the most interesting cases in this connec-[fol. 321] tion—it happened to be the case of the United States Government right in this Courtroom here involving airplanes, where Judge Kirkpatrick, by reason of the failure to produce the reports, granted a summary judgment.

We had a similar case of Eastern Air Lines involving the Florence disaster which came out of the District of Delaware, which I tried, which was brought up in this court here. There again all of the reports made by the auditor in connection with that particular disaster, they refused to give. There was a decision by the Supreme Court later in connection therewith, but I think here without a doubt that there is nothing that is a lawyer's work, and where he goes ahead and refers to it and bases part of his testimony on it, you are certainly entitled to look at it.

However, Your Honor please, I have made my suggestion. I have made my request that the witness produce the memorandum that he made, his field memorandum, taking into account that he has interviewed thousands of people in the meantime, and I think that the case of Reynolds vs. United States, 345 U. S., page 1, controls this situation.

Hearing Examiner Piper: I think the procedure applicable is self-evident. Mr. Henderson's request that the witness produce the data upon which he has testified, according to his own testimony, is pertinent, one that the Courts have always recognized as a right of cross-examination. On the other hand, the Courts have recognized and upheld the nature of confidential information of the trials of the different agencies of the Government.

The rule that I was thinking about in the Commission's rules is 1.133, and which says that the records and files [fol. 322] of the Commission, all documents and correspondence, exhibits, et cetera, coming into the possession or to the knowledge of the Commission and any officers and employees in the discharge of their official duties are confidential and none of this material may be disclosed or produced for inspection or copied except under the procedure set forth in 1.134, which sets for the the procedure for the release of confidential information by order of the Commission.

But the solution to me is self-evident. Counsel has raised the point that he could not produce the data because it is confidential under the Commission's rules, and it is confidential under the Commission's rules. Counsel for respondent has raised the point that if he does not have the data he is being deprived of proper cross-examination and in my opinion it would be a deprivation of due process.

Therefore, if counsel for the Government refuses to produce the files, as he has a right to do. I will strike the testimony of this witness, because otherwise the respondent would be deemed deprived of the right of cross-examination and this testimony would be worthless.

. . . . . .

Hearing Examiner Piper: Let me ask you, do you believe that in your testimony that is on the record already that you have explained to us what use you made of your field report prior to taking the stand?

The Witness: I have explained to you the use that I made of the field report, but I have not explained to you [fol. 323] what my recollection of the matter was before I even looked at the field report, and I do have a recollection.

Hearing Examiner Piper: Then why did you look at the field report?

The Witness: To refresh my recollection.

Hearing Examiner Piper: Do you want to proceed further? I am reserving ruling due to the fact that Commission counsel wishes to appeal my ruling. How are you going to appeal a reserved ruling?

Mr. Wilson: Are you going to rule after they finish cross-examination? You can just put this in abeyance until such time as cross-examination is completed.

Hearing Examiner Piper: All right.

Mr. Henderson: Mr. Examiner, as far as I am concerned, I have no further cross-examination.

Mr. Wilson: Your Honor please, if the Commission reverses you on this appeal they do not have the right to recall this witness for further cross-examination. I want that to be clear on the record.

. . . . . .

[fol. 324] Mr. Henderson: I am merely reserving whatever rights I may have under the circumstances in this case and not proceeding further with any cross-examination because I do not now feel it is necessary at all, and I think I am entitled to reserve those rights.

Hearing Examiner Piper: You have a pending motion to strike.

Mr. Henderson: Yes, sir.

Hearing Examiner Piper: Motion granted. Is that all?

Mr. Wilson: Yes.

(Witness excused.)

Hearing Examiner Piper: Do you have anything else, Mr. Wilson?

Mr. Wilson: Other than our appeal on this last ruling, that completes the Government's case.

. . . . . .

MOTION OF COUNSEL FOR RESPONDENT TO DISMISS COMPLAINT AND RULING THEREON

Mr. Emmerglick: If Your Honor please, I would like to move on behalf of the respondents to dismiss the complaint upon three grounds:

[fol. 325] First, upon the ground that there is no proof that Sun made sales at different prices to competing customers who are engaged in the same market area in competition with each other.

The Government's proof rather assumes that the sta-

tions in Jacksonville, Florida, all operate throughout a common market area. It has produced no evidence to establish that that is the fact. I do not wish to argue from particular facts that with respect to one station or another it is not the fact. My point is that there is no proof in support of the essential allegation of the complaint.

Let us take the first count, for example. Paragraph Three alleges that the respondent has sold its gasoline to a dealer in the Jacksonville, Florida, market area engaged in selling said gasoline at retail, at prices substantially lower than the prices charged by respondent to its other retail purchasers in the same market area.

Now this last is as essential an element of proof as is difference in price, and there is no evidence of the fact. If anything, since counsel for the Commission agreed that there should be, so to speak, a jury view, the only evidence in the record as to the nature of the market area is that jury view which I submit is evidence which negatives although it does not appear on the record but is only in Your Honor's mind, is evidence which negatives the claim of this complaint. At any rate, there is no evidence which undertakes to prove it. This is my first ground.

The second ground for my motion is that there is no evidence, even assuming that you are to give some credit to witnesses called by the Commission, whom it then proceeds to endeavor to discredit, even if you are to give some [fol. 326] credit to the testimony of such witnesses, there is no evidence of a substantial as distinguished from a trival or sporadic interference with competition, within the meaning of the decisions.

First let me address myself to the first count. Perhaps Your Honor will recall the recent decision in Edelmann v. Federal Trade Commission and the earlier decision in the Minneapolis-Honneywell case, where the Supreme Court denied certiorari, where it was pointed out that the Act requires proof of substantial—not trival or sporadic—interference with competition, and elsewhere it was said that it is implicit in the Act that discriminations which are negligible and which have at best a remote effect on competition, are not within its prohibitions.

Now, what happened? Again I am addressing myself

merely to the failure of proof. No witness called by the Commission testified to any damage for any period of time, with the exception of Mr. McLean. We can not say that Mr. Crabtree established injury to competition. We can not say that Mr. Winning's figures, which show no decline, established injury to competition, or Mr. Peery's. Mr. McClung alone testified that he saw a few of his customers in the McLean station, but what does this amount to? It is the trival and inconsequential loss of business to which the statute is not addressed. I say that because the Commission has affirmatively proved that in the middle of February a general price war broke out. Upon the breaking out of that price war everybody was on the same level, so that the proof is that for a few days at most McClung noticed some of his customers in McLean's station. This is not evidence sufficient to establish a substantial continuing injury to competition.

[fol. 327] Now as to the second count, may I point out that assuming—and we do not admit it for a moment, because we plan to take a very strong position upon this—but assuming that there was price fixing of McLean's price by an agreement. This is not the kind of price fixing at which the statute is aimed. The statute provides in Section 2(b) that a seller may in good faith give a customer a lower price to meet the lower price of a competitor. In doing so, Sun had to give some dimensions to the price assistance given to McLean. If Sun gave McLean help for longer than it was necessary for McLean to meet the lower price of a competitor, Sun would not have the benefit of its good faith defense.

Therefore the arrangements under which Sun gives lawful dimensions to the price assistance to McLean must certainly themselves be lawful, else Section 2(b) is meaningless.

Now may I then state my third ground, and it is this: That there is no evidence from which it is possible to infer an agreement between McLean and Sun that McLean would post and keep a fixed price. Now I ask Your Honor to bear with me while I read three short excerpts from the examination of McLean:

"By Mr. Wilson:

"Q. Well, I will ask you this, then: Weren't you required to do something to obtain that?

"A. To obtain that price?

"Hearing Examiner Piper: Yes.

"A. No. I dropped my gas but I wasn't required. I didn't have no agreement with them to do anything as far as lowering my price or raising my price or anything.

[fol. 328] "Q. So you reduced your price at that time after this visit from Mr. Harper from 28.9 to 25.9?

"A. That is right.

Now, one more short excerpt:

"Q. Now, you told us in your direct examination that you were closed for two days and then Mr. Harper came in one morning and on that very day he came back later and you got help. I want to ask you were those two days Christmas Day and December 26?

"A. It was.

"Q. So that when you got your help it was on December 27?

"A. I am pretty sure it was."

Now, here then is the evidence presented by the Commission. The witness testified that he had no agreement with Sun fixing his price that he would post. He testified that his help came as a result of a visit from Mr. Harper and that it was on December 27. This is the Commission's evidence on it.

Now, Your Honor heard a short while ago an attempt to, as Mr. Wilson puts it, corroborate this witness' evidence. I have no doubt that Mr. Wilson sincerely believes that he was undertaking to corroborate the witness, but it is my submission that the effect of what he did was to undertake to impeach the witness, for Mr. Gravatte testified that Mr. McLean said to him that somebody from Sun told him on the phone, if you will do so-and-so, we will do so-and-so.

Now here is a doublebarreled contradiction of McLean's testimony, as I have read it, and I submit it amounts to, in effect, an effort to impeach the witness.

What does it do in this case? It serves, under familiar principles, to wipe the slate clean at best. If you are going

[fol. 329] to give any effect to the evidence of Mr. Gravatte, it simply serves to neutralize the testimony of a witness called by the same party which it now wants to get rid of. Gravatte's testimony cannot stand on its own force; McLean's testimony is wiped out by Gravatte and there is nothing in the record.

Upon these grounds, then, we respectfully submit, under familiar principles, that the Commission has failed to prove its case, and we think that in the interest of the sound administration of justice when a public prosecution fails it is quite as important that the failure be acted upon, and that under any circumstances the correct result be achieved at the earliest possible stage of the litigation.

* * * * * * * * *

Hearing Examiner Piper: I think I understand your theory, that if you made an arrangement with a particular dealer or a group of dealers to furnish them with a discount in order to meet competition and you made it in good faith, and that would necessarily limit its scope, then that arrangement could not be illegal because it was limited?

Mr. Emmerglick: Precisely. But this is what is said to be price fixing here.

* * * * * * * * *

[fol. 330] Hearing Examiner Piper: Respondent's motion with respect to Count I is denied, and with respect to Count II, I will reserve ruling on it.

* * * * * * * * *

WILLARD W. WRIGHT, was called as a witness for the Respondent, and having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Henderson:

Q. Mr. Wright, will you give us your full name for the record?

A. Willard W. Wright.

Q. Where do you live?

A. I live at 352 Chamounix Road, St. Davids, Pennsylvania.

Q. And you are connected with Sun Oil Company in what capacity?

A. I am vice president in charge of marketing.

Q. How long have you been connected with Sun Oil Company?

A. In answer to your last question, Mr. Henderson, I am in my 35th year with the Sun Oil Company.

Q. Will you state briefly your education and training?

A. I took engineering at Drexel Institute; left there and went into the Navy; was commissioned an officer at Annapolis, Maryland.

Q. Will you state briefly your experience in the 35 years you have been with Sun?

[fol. 331] A. I joined Sun in 1922 as an industrial engineer. Two years later I was moved to Florida as superintendent of the Peninsula State Oil Company, a wholly-owned subsidiary of the company.

In 1926 that company was merged with the Sun Oil Company, and I became the assistant regional manager.

In 1928 I was moved to Canada as managing director of our Canadian company.

In 1934 I returned to the States as assistant regional manager of the Western Region.

In 1935 I was appointed regional manager of the New England Region. I stayed there until 1949, with two years' leave of absence while I was on loan to the Government, P.A.W.——

Q. What does that mean?

A. That is Petroleum Administration for War.

Q. All right.

A. —as district manager of District 1 in charge of supplies and distribution for the seventeen eastern States.

In 1949 I was appointed assistant general sales manager.

In 1950 I was appointed general sales manager of the company.

1952 I was elected to the Board of Directors, and in 1957 I was elected a vice president.

Q. In charge of what?

A. I had charge of the operation of our marketing department. Under that operation I have charge of the sales of the petroleum products, petrochemicals that we manufacture both in the United States and abroad.

Q. Will you please tell His Honor the functions you performed as general sales manager in 1955?

[fol. 332] A. Under the direction of the vice president in charge of marketing, I performed practically the same functions, namely, the operation of the marketing department and the sales of petroluem products which we manufacture both here and broad.

Q. Mr. Wright, with reference to gasoline and its marketing, will you tell His Honor briefly the market or market levels involved in getting gasoline into a motorist's tank?

A. Gasoline, after it is manufactured at the refinery, moves by forms of transportation generally pipeline or marine transportation into a terminal. From these terminals it is distributed to the dealers by tank wagon or tank truck.

Sun Oil Company has two methods of operation. They operate direct through dealers, that is, the product moves in our own tank wagons to independent dealers handling oil products, and we have a restricted number of distributors who distribute the product in tank wagons from their terminals to their dealers.

In all cases in the Sun Oil Company operation the product which is marketed either by our dealer or by the distributor-dealer is our branded Blue Sunoco motor fuel.

This procedure or situation is not entirely the same with other companies. Other companies have had direct operations; they have distributors and they had jobbers who handle their gasoline. Sometimes they have all three people marketing in one area. With Sun wherever we operate

direct we have no distributors. The reverse is true; wherever we have a distributor we have no direct operation. In other words, we have no dual distribution.

[fol. 333] Mr. Wright, in 1955 as sales manager of the company, to your knowledge to what extent was gasoline sold at retail to the motoring public by stations offering only one brand of gasoline?

A. Practically all. I would say all gasoline is sold to the public through stations operating or handling one brand of gasoline.

Q. Now, for the benefit of His Honor can you tell us how it has come about that undivided stations, that is, only handling one brand, are the prevailing type of distribution of gasoline to motorists?

A. Mr. Henderson, that comes about by the increasing brand consciousness of the consuming public. All manufacturers and distributors of branded products have been emphasizing the superiority of their brand. They do this through advertising. They emphasize their brand through the type of packages they use. They are neat; they are objective; they are easy to handle.

I would also say that during this time all consumers were buying branded packed products in packages. They buy coffee in packages; they buy brands of cookies in packages, and it has been the same with gasoline.

Q. You are speaking about the brand names?

A. I am speaking about the brand names. People were buying all of these brands and they were buying brands of gasoline. As the motoring public found out through company-operated service stations handling one grade in a brand of gasoline that it offered the kind of product, a high grade product, and the kind of service that they desired, more and more motorists turned to these undivided company-operated service stations for their products.

[fol. 334] The impact of this turning was very definitely felt by the undivided service station and in order to protect himself he started to handle a branded product in an undivided manner.

Q. When you speak of a divided station, you mean one that sells more than one brand of gasoline?

A. Yes, sir. I might say that this handling of gasoline through divided stations proved to be extremely economical,

both for the supplier and for the dealer handling the products, and all suppliers and dealers started or all suppliers—by that I am referring to the majors—and the so-called independents, which we call non-majors—started to feature the superiority of the brands.

Q. Mr. Wright, if you know, about how much does the Sun Oil Company spend on gasoline advertising?

A. That I know, a third of a cent a gallon. This year our budget is $6 million.

Q. What advertising media does Sun employ?

A. We employ all advertising media, radio, television, newspapers, point of sale, direct mailing campaigns billboard—in fact every media that is available to us.

Q. In the supply of the gasoline to the motoring public, speaking of the supply for a moment, as distinguished from the demand of the motorist, what are the principal or outstanding characteristics of that supply?

A. Well, gasoline is flammable. Gasoline is a liquid and it is important to not only sell the gasoline but place the gasoline in the tank of the motorist. There is a well known fact that gasoline is sold in the form in which it is manufactured and suffers or goes through no change in form between the tank of the refinery and the tank of the motorist. Also it takes a lot of money, a big investment [fol. 335] in plants and equipment to handle it, the manufacture and distribution of gasoline.

The marketing of gasoline takes a big fixed cost. Practically all gasoline is sold under a brand name and the refiner and supplier of gasoline very aggressively tries to promote greater public acceptance for his or its particular brand.

Q. Mr. Wright, was this true in 1955 and 1956?

A. Yes, sir.

Q. Was it true in Jacksonville in 1955?

A. It was.

Q. What are the leading characteristics of the motoring public's demand for gasoline?

A. Well, the motorist generally buys his gasoline from one service station. This service station is selected on the basis of location and is usually close to either the motorist's place of business or the place he resides. If a motorist is on a trip then the motorist has a tendency to buy his gaso-

line from a station handling the brand of gasoline he usually purchases or if that gasoline is not available he buys from a service station that is neat and attractive in appearance.

Q. Was this likewise true in '55 and '56?

A. Yes, sir.

Q. How about the conditions in 1955 and 1956 in Jacksonville, Florida?

A. I think the same conditions pertain.

Q. As the results of these characteristics in supplying gasoline have there come about any well fixed and industry recognized buying habits on the part of the motoring public?

A. Yes. There are a great many where the motorist buys, the motorist who buys gasoline, there are a great many [fol. 336] of them that buy this gasoline at all times. They buy in relatively small quantities for their own consumption——

Q. Mr. Wright, let me interrupt you just a moment. You have had great experience in this business. What are the outstanding buying habits of the motoring public, if you please? You started to tell us some, where they buy from and so forth. Would you tell us that?

A. I thought I had told you that they bought this gasoline generally from one service station, Mr. Henderson.

Q. How about the location of that service station?

Hearing Examiner Piper: I think he covered that.

Mr. Henderson: Very well.

Hearing Examiner Piper: He said it was generally near their home or where they worked, unless they were traveling.

By Mr. Henderson:

Q. Now, Mr. Wright, would you say whether or not the characteristics of supply and demand that you have described and the buying habits you have mentioned have resulted in patterns of trade which followed a practice?

A. Yes.

Q. Did these patterns prevail in 1955 and 1956 in Jacksonville, Florida?

A. Yes, they did.

[fol. 337] Q. And what were they?

A. Well, these patterns of trade have developed that the area in which competition in buying and selling gasoline

takes place is around a relatively small area surrounding each service station or group of service stations, and in this area the suppliers of gasoline through their independent dealers compete for the patronage of the dealer or of the motorist living close by this station or group of stations. In this setup the dealer actually is a conduit between the supplier enjoying the patronage of the motorist and the motorist and in essence they become the dealer and the supplier become a team of which the supplier and not the dealer assumes the major responsibility for promoting and guiding competition within the area.

Q. How about the question of the maintenance of the stock required to supply the needs of the motorist? Who maintains that?

A. Very definitely it is the motorist who maintains the stock of the service station. You see, the motorists buy gasoline in very small quantities and they also buy—there are a number of motorists who are buying gasoline in not very large amounts at any one time. This means that the marketing system has been geared to handle these small quantity purchases. It is impossible, as you know, for a motorist to store gasoline with the result that the distribution system has been designed to meet the demands for gasoline and the broad mobility of the motorist making it necessary to have gasoline available wherever that mobility takes the motorist and occasions the demand for gasoline.

Q. Mr. Wright—

A. I don't think I answered your question fully.

[fol. 338] Q. Let me ask this question. Perhaps it would help clarify it further. I was asking about who really supplied the gasoline—

A. Well—

Q. —as opposed to the service station operator.

A. Now, it is not the service station operator, due to the limits facilities available, who is able to supply the repeated demand for gasoline, but it is the supplier who assumes that responsibility. Service stations are just too small to permit more than a few days' supply of gasoline.

Q. Now, Mr. Wright, are you familiar with the station at 19th and Pearl Streets in Jacksonville, which is the subject-matter of this controversy?

A. Yes, I am.

Q. Did the pattern of trade prevail there in May, 1955, and early 1956 which you have testified to?

A. Yes, they did.

Q. Was that late in May of '55?

A. Well, it could be late in 1955 as well as May, '55

Q. As well as early 1956?

A. As well as early 1956.

Q. Would you please state specifically who were the sellers of gasoline competing for the business of the motoring public passing 19th and Pearl Streets?

A. The Sun Oil Company through its independent dealer, Mr. McLean, and the Super-Test station through its company-operated station.

Q. Was your company competing for that business with the Super-Test chain only, or with the station as a retailer of Super-Test gasoline?

A. We were competing with the station as a retailer of Super-Test gasoline for the business of the motorist residing or working near that location, 19th and Pearl, and who [fol. 339] would find it convenient to stop at that station.

Q. Upon what facts do you base your conclusion that Sun was in competition with the individual Super-Test station across from the one operated by McLean for the business of motorists in that immediate neighborhood?

A. Through the fact that our communication had been direct to the motorist through all the media of advertising which I have mentioned; through the fact that we have neat, attractive service stations distinctively marked; we have dealers that are trained and able to render the kind of service the motorist requires, and of prime importance the fact that we had no other Sun station in the vicinity able to serve the motorist's needs.

Q. Does Sun have a well-defined or established policy in locating its stations and in determining the location of one station in preference to other such stations?

A. Yes, sir, we have such a policy known as our Objective Development Plan.

Mr. Henderson: Mr. Examiner, I am going to ask Mr. Wright some questions, and some of the data from which the source material comes are in the documents which I have in front of me, but I do not wish to load up this record

with these large documents. I have just shown them to my friends, and if they want to see them they are here and available and I will now ask him about them. He just a moment ago spoke about the Objective Development Plan, and first I am going to ask him what that is. Then they have a Franchise Plan, and I am going to ask what that is, and then they have the Little Sun Story, which are con- [fol. 340] tained in these various documents.

This can be done from the witness' own knowledge, and I do not see any reason for loading up the record with all those books. They are available if they want to see them.

Hearing Examiner Piper: Very well.

Mr. Wilson: He is going to testify independently, of his own knowledge?

Mr. Henderson: That is right. He is not going to testify from these documents, but they are company documents, Mr. Wilson. He just a moment ago spoke about the fact that Sun did have a well-defined program known as the Objective Development Plan, and I am now going to ask him to describe the Objective Development Plan.

The Witness: The Objective Development Plan was the plan we worked out to develop the maximum coverage in any area with the minimum number of service stations. In order to put the Objective Development Plan into operation we prepared this booklet, and I believe the date was 1939 when we sent it out to all of our district and regional operations.

The basic concept of the plan was that the district manager made a survey of his territory. He prepared maps showing traffic flow, zoning, concentration of population, places of business, such pertinent information as various [fol. 341] mercantile establishments, and he also placed on that map all of our existing outlets.

Having done that, he then set up those places in relation to this information where he would require additional distribution. These were known as objective development areas, and the instructions to the field were that we would not take any dealer, take any leases or make any purchases outside these objective areas.

Having established these objective areas, they were reviewed by the regional manager who rode the territory and had the benefit of the information on the maps and such

other pertinent information as was available, and either approved or changed the objective development area. Later on these objective development areas were ridden and approved by either the general sales manager or the assistant general sales manager.

That in essence is what this contains in that book.

By Mr. Henderson:

Q. The next book is a Sunoco Franchise. What is that?

A. This Sunoco Franchise was aimed to our dealers to show them the advantage of selling Sunoco products. It starts out with information as to product, training courses, other things that help the dealer, advertising. But the essential part was the fact that it featured the Sunoco franchise and the exclusiveness of the Sunoco franchise, because we have always tried to sell our dealers on the fact that they had an exclusive franchise and that no other dealer would be in competition with them.

[fol. 342] Q. That is the Sun dealer?

A. The Sun dealer is a later addition——

Q. Mr. Wright, that there would be no other dealer in competition with them, you meant a Sun dealer?

A. Yes, I meant a Sun dealer.

Q. Now, the Sunoco Story in 1956.

A. The Sun franchise is a latter addition of the Sunoco Story which is, I think, done a little better, but the essential parts are there.

Q. What are the advantages of the plan we were talking about to Sun Oil Company?

A. The advantages of the plan to Sun Oil Company are that we get maximum coverage with a minimum number of dealers, and therefore get a larger volume of gasoline through each individual dealer's outlet.

Q. What about the independent Sun dealer?

A. The independent Sun dealer, because he has this exclusive franchise, does a larger volume of gasoline business on which he makes a greater profit. He also does a larger volume of related product on which he makes a greater profit.

Q. What part do you play in passing upon or advising as to the establishment or location of a new Sun station?

A. Well, as stated previously, the objective development

areas are approved either by the general sales manager or the assistant general sales manager, and no purchase or lease is taken until it is approved by the general sales manager.

Q. And that was you, up until recently?

A. Up until just recently.

Q. After the Objective Development Plan was inaugurated, was it employed respecting sites for Sun stations and dealer outlets in Jacksonville, Florida?

A. Yes.

[fol. 343] Q. Now, Mr. Wright, I am going to show you Respondent's Exhibit 5, which is a map.

(The document referred to was marked Respondent's Exhibit 5 for identification.)

Mr. Henderson: Mr. Examiner, I am now going to offer Respondent's Exhibit 5. It is a map of Jacksonville, and I will ask Mr. Wright to explain it.

By Mr. Henderson:

Q. Mr. Wright, I would like for you to examine the map which has been marked Respondent's Exhibit 5 for identification, depicting the station at 19th and Pearl Streets, and the other Sun stations in the area.

Are you able to tell us whether these stations, that is, all these Sun stations were located pursuant to the Objective Development Plan?

A. These three stations located in what is known as the Riverside section of Jacksonville, and the station over here just off Sheridan Street (indicating)—I think it is King Road—those stations were located prior to the inception of the plan. These other stations out here (indicating) were all located subsequent to——

Mr. Wilson: I think the record should show where he means when he says "out here."

By Mr. Henderson:

Q. Mr. Wilson asked that you indicate where these stations are located. Will you make it definite, please?

[fol. 344] A. I will. We are located—I am trying to find the line——

Hearing Examiner Piper: Would it simplify it if you said that all of the stations other than the ones you have already named were located pursuant to the plan?

The Witness: Yes, I would be delighted to modify my testimony and say all of the stations, other than the four I have indicated, were located subsequent to the inception of the Objective Development Plan.

By Mr. Henderson:

Q. And that was three in the Riverside section and one Kings Road station, is that right?

A. Yes, sir, and those stations, of course, were put in in conformity with the Objective Development Plan and took into consideration the existing stations.

Hearing Examiner Piper: Where is the Riverside section you are talking about?

The Witness: The Riverside section is on Riverside Avenue, Park Avenue and College and Forest.

Hearing Examiner Piper: In the downtown area?

The Witness: No, sir, they are not in the downtown area; they are over on the other side of the railroad viaduct [fol. 345] on the way out toward Ortega and Fish Weir Park and that section of Jacksonville. I happen to be very familiar with them because the stations were built during the time when I was in Jacksonville either as the superintendent of the Peninsula State Oil or the assistant regional manager.

The service station over here on King Road (indicating), and it is a rather small station, is in somewhat the junction of Davis and I believe—I can't read this—it is Prince Street.

By Mr. Henderson:

Q. Now, Mr. Wright, what has the Objective Development Plan meant in terms of number of stations that Sun utilizes for the sale of gasoline compared with the number of stations utilized by some of its major competitors for the sale of equal gallonage?

A. We do a greater gallonage, or we do the same gallonage through a smaller number of stations.

Q. Mr. Wright, do you have available data as to number

of stations by classes through which Sun sold its brand of gasoline to motorists just before the Objective Development Plan was inaugurated, compared with the number of such stations in 1955 and 1956?

A. Yes, sir.

Q. Is that the document you have in front of you?

A. Yes, sir.

Mr. Henderson: May I have that marked as Respondent's Exhibit 6.

(The document referred to was marked Respondent's Exhibit 6 for identification.)

[fol. 346] By Mr. Henderson:

Q. Mr. Wright, will you tell us exactly what this is?

A. This is a comparison of retail sales 1938 versus 1956, excluding commercial accounts and——

Hearing Examiner Piper: You do not know what "W.O." stands for? I do not, either.

The Witness: I don't know what "W.O." stands for.

Mr. Henderson: Wholesaler.

The Witness: I would think it would be wholesale accounts, "W.A."

We refer to them as distributors. The lower portion is a breakdown of accounts by classification.

By Mr. Henderson:

Q. The "L. & O." you know, of course, is leased and owned?

A. Yes, sir, I know that, and I know the "Option," the "Car Dealer" and the "Other" would be all dealers not coming in the other classification.

Q. What is the source of this information, Mr. Wright?

A. It would be the records in our motor products department, the company records. We keep very accurate records on this information.

[fol. 347] Hearing Examiner Piper: Any objection?

Mr. Wilson: May I ask the witness a question, if Your Honor please?

Hearing Examiner Piper: Yes.

Mr. Wilson: Did you prepare this, Mr. Wright?

The Witness: Did I?

Mr. Wilson: This Respondent's Exhibit 6 for identification?

The Witness: Did I prepare this?

Mr. Wilson: Yes.

The Witness: No, I didn't.

Mr. Wilson: Was it prepared under your direction?

The Witness: It would be prepared under my direction because it was prepared by the motor products department. [fol. 348] Mr. Wilson: Was it prepared under your direction?

The Witness: I was present at the time we discussed its preparation, and was present when the individual who was to prepare this was assigned.

Mr. Wilson: Did you assign him to do it?

The Witness: Yes, I think I did.

Mr. Wilson: Do you know whether you did or not?

The Witness: Yes, I assigned the gentleman or the department who would prepare this information and asked him to get this information available.

Mr. Wilson: What was his name?

The Witness: Mr. Childs, Arnold Childs. He is here in the Courtroom.

Mr. Wilson: Are you familiar with these figures?

The Witness: I can't say that I have seen this particular compilation of figures going back to '38 and '56 in this [fol. 349] comparative manner, but I am very familiar with the figures which we take off from time to time showing a comparison of our retail sales by classification, by region. I get a copy of similar information every three months.

Mr. Wilson: Over here where it says "Total U.S.A. Blue Sunoco, 1938 to 1956, per cent of change, plus 197.7," what does that mean?

The Witness: That means that we increased our business in 1956 over 1938, excluding commercial and wholesale accounts, by 197.7 per cent.

Mr. Wilson: And where it says "Number of Retail Accounts," is that a minus 22.8 per centage change between 1938 and 1956 showing a reduction in the number of retail——

The Witness: We actually reduced our number of retail accounts during that period.

Mr. Wilson: What do you mean by "retail accounts," Mr. Wright?

The Witness: I am referring to our L. & O. accounts, which we refer to, in other words, as AA accounts, our option accounts, our car dealers and our A accounts. In other words, accounts who are selling gasoline to the consuming motoring public.

[fol. 350] Mr. Wilson: If Your Honor please, I think the witness is competent to testify to this. I have no objection other than the one I stated previously.

Hearing Examiner Piper: All right. Respondent's Exhibit 6 is received.

(The document referred to, heretofore marked for identification as Respondent's Exhibit 6, was received in evidence.)

Hearing Examiner Piper: You never did offer Exhibit 5, Mr. Henderson.

Mr. Henderson: Mr. Examiner, I will offer that through Mr. Childs, who has more familiarity with it than this witness.

Hearing Examiner Piper: All right, you can offer it whenever you wish.

Mr. Henderson. Well, I will offer it now.

Hearing Examiner Piper: That is the map.

Mr. Wilson: Your Honor please, may I have a continuing objection as to Count II?

Hearing Examiner Piper: Yes, I was going to suggest that before, that you might have a continuing objection to the relevancy with respect to Count II.

[fol. 351] Mr. Henderson: I will now offer Respondent's Exhibit No. 5 in evidence.

Hearing Examiner Piper: Respondent's Exhibit 5 is received.

(The map referred to, heretofore marked for identification as Respondent's Exhibit 5, was received in evidence.)

By Mr. Henderson:

Q. Is Sun now selling gasoline over a larger geographic area than it was at the time the plan was inaugurated?

A. Yes, sir.

Q. By about what percentage have you increased the territory you serve in that period?

A. Approximately 36 per cent.

Q. Mr. Wright, I take it from time to time you are called upon to deal with price problems in connection with the sale of Sun gasoline, is that correct?

A. Yes, sir.

Q. Apart from the general price of your product, have you had occasion from time to time to do with either broad or small price wars?

A. Yes.

Q. So that we may better understand what we are speaking of, would you tell us what you mean by a price war, in your experience?

A. A price war, in my experience, is when any competitor reduces their price or their retail price to the motoring public and adversely affects the gallonage of our dealers, and through our dealer or dealers our own gallonage.

[fol. 352] Q. On the basis of your experience, how do price wars come about?

A. Well, price wars come about in many ways. First, a dealer will lower his price in the hope of obtaining a gallonage and therefore a monetary advantage, adversely affecting the gallonage of the surrounding stations. This is a highly localized price war.

Or a chain of stations in the market may decide that they have to lower the price throughout the chain to increase their volume of business through that chain of stations, and of course you have a price war of larger extent.

Or one of the chains—and this is particularly true where the chain builds a new station—the chain's management may decide that it will lower the price at that particular chain in order to get that station off to a good start and build a high gallonage with greater rapidity than normal. This is a practice that is rather well recognized in the industry.

We may have a situation like the one which has existed on the Eastern Seaboard where a large refiner and supplier of petroleum products decides to come into the market and he lowers his price and makes favorable contracts with distributors and with dealers which enables them to lower their price.

Then we have a widespread price war, or we may have an over-supply of gasoline resulting in the supplier with the long position on gasoline making favorable contracts known as "dumping," to enable that gasoline to move into the market.

Q. Does that ever arise from new marketers coming into the area?

A. Well, I covered that, I thought, Mr. Henderson, when I said a manufacturer.

[fol. 353] Q. Now let's go to Jacksonville, Mr. Wright. With respect to the Jacksonville area, have you kept abreast of competitive developments there in recent years?

A. Since 1949, yes.

Q. Did you have brought to your attention in 1955 a situation respecting the station operated by Mr. McLean at 19th and Pearl Streets in Jacksonville?

A. Yes, I did.

Q. Who brought it to your attention?

A. Mr. Dietsche, our regional manager.

Q. On the basis of Mr. Dietsche's information given to you, what if any steps did you take in connection with that matter?

A. Well, I asked Mr. Dietsche what was causing the price difficulty at that particular point. He advised me that there was a station across the street drastically reducing its price and adversely affecting the gallonage of our dealer to the point where our dealer said he needed help——

Mr. Wilson: Excuse me, Mr. Wright, but for the sake of the record should we not establish the approximate date when Mr. Dietsche first contacted Mr. Wright and have it in chronological sequence?

Mr. Henderson: Certainly.

The Witness: Mr. Dietsche first contacted me in December at the regional managers' meeting which was either the 16th, 17th or 18th of December. We hold a regional [fol. 354] managers' meeting in the middle of December, so it would be in that week, Mr. Wilson.

By Mr. Henderson:

Q. Was that in Philadelphia?

A. That was in Philadelphia.

Q. All right, go ahead.

A. At that time Mr. Dietsche told me that granting an allowance to this dealer would be in accordance with our policy.

Q. Now, on the basis of Mr. Dietsche's information given to you, what steps did you take?

A. I asked Mr. Dietsche to return, have a careful check made——

Q. When you say "return"——

A. I meant return from Philadelphia to Jacksonville, his headquarters, make a careful check of the gallonage of the other dealers in that section of Jacksonville or in Jacksonville, as a matter of fact, to determine whether the Super-Test lower price had adversely affected their gallonage.

He did so, and then called me on the 27th of December and told me he had made that check and he could find no evidence of this adverse affect, and that plus my rather definite knowledge of the situation around 19th and Pearl led me to take action.

Q. Had you received any written request from Mr. McLean to give him assistance?

A. I did not.

Q. I mean the company?

A. I do not know.

Q. The document is already in evidence.

A. Well, such a written request would not be referred to me.

[fol. 355] Q. All right. What do you mean by a voluntary allowance?

A. A voluntary allowance is a reduction under the tank wagon price.

Q. And what is the tank wagon price?

A. The tank wagon price is our posted tank wagon price at which we sell retail accounts in the particular tank wagon area involved.

Q. Did you or did you not authorize any price assistance be given to Mr. McLean, and what prompted you to so?

A. I authorized a 1.7 voluntary allowance. I did so on the basis of what I have said previously, the appeal to us for assistance, the fact that the dealer said he was going out of business and the additional information which I had received that no other deal from our records was adversely affected by the price situation at 19th and Pearl.

Q. Apart from your own knowledge of this particular station in relation to other Sun stations in Jacksonville, did you direct that any steps be taken to determine whether a price allowed to McLean would adversely affect any other Sun dealer in Jacksonville, and if so, why?

A. Mr. Henderson, I felt that the fact that the other dealers were not affected at the time Super-Test drastically lowered its price would be indicative of the fact that other dealers were not adversely affected. I also had Mr. Dietshe's assurance that they would not be adversely affected because of his knowledge of the territory.

Q. In your experience would you be able to protect Sun's total gallonage in a price war by giving price assistance to less than all the dealers affected?

A. No, sir.

[fol. 356] BEFORE FEDERAL TRADE COMMISION

Courtroom No. 2
U. S. Court House
Philadelphia, Pennsylvania

Tuesday, May 14, 1957.

Met, pursuant to adjournment, at 10:00 o'clock a.m.
Before: Robert L. Piper, Hearing Examiner.

APPEARANCES:

Rufus E. Wilson and Ross D. Young, Attorneys for the Federal Trade Commission.

Joseph W. Henderson, 1910 Packard Building, Philadelphia, Pennsylvania:

Leonard J. Emmerglick, 1826 Jefferson Place, N. W., Washington, D. C.;

J. Blair Moffett, 1608 Walnut Street, Philadelphia, Pennsylvania; and

Henry R. Frye, 1608 Walnut Street, Philadelphia, Pennsylvania, Attorneys for the Respondent.

. . . . . .

ARNOLD CHILDS, was called as a witness for the respondent and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Henderson:

Q. Mr. Childs, where do you live?

A. I live in Rosemont, Pennsylvania.

[fol. 357] Q. Are you connected with Sun Oil Company?

A. I am.

Q. In what capacity?

A. I am in charge of both the market research for Sun Oil Company.

Q. How long have you been with Sun?

A. This is my seventeenth year.

Q. Will you tell us about your education and experience?

A. After high school I went to the Massachusetts Institute of Technology. I graduated from there in 1931 with a B. S. degree. I did do some graduate work, taking course in marketing, economics and statistics.

. . . . . .

Q. As director of market research will you tell His Honor the various functions that you perform for the company?

A. As director of market research I supervise the various fact finding work that is done pertaining to marketing, price surveys, dealer studies and so forth.

Q. Do you have any staff working under you?

A. I do.

Q. How big?

A. We have nine permanent people at the present time.

. . . . . .

Q. In Sun's marketing research department have you made any studies comparing posted prices of gasoline of major oil companies with the price posted in the same markets for non-major brands of gasoline?

[fol. 358] A. Yes, we have made such studies?

Q. Is there a normal differential between majors and non-majors for regular grade gasoline?

A. There is no normal differential. It varies considerably. It will vary from 1 cent in some markets to 2 cents over a period of time; in other markets or even in the same markets in different times and in different markets it may be 3 cents, or we have had instances where it has been higher.

Q. Now, Mr. Childs, you have stated that you have made studies. Can you tell something about such studies?

A. Yes. One of the series of studies we made going back for six or seven years are price studies comparing prices and our volume in a series of markets where non major competitors appear to present a problem to us and in those markets we are getting weekly and monthly information in charting that for our officials of our marketing department.

Q. Do you have with you the original of such charts?

A. Those charts are in this room.

Q. Are they maintained on a continuing basis to permit your company's marketing officials to follow the price of those markets?

A. Those charts are here, sir.

Q. How many areas do these cover?

A. They cover 14 different marketing areas, major marketing areas. Some of them are quite wide areas.

Q. I hand up to you a document which I will ask the reporter to mark as Respondent's Exhibit 7.

(The document referred to was marked Respondent's Exhibit 7, for identification.)

[fol. 359] Q. First, Mr. Childs, will you tell us what that document is, please?

A. This document represents information from some of the areas I named where we have here a comparison of prices and proportional number of stations of the various prices in these selected areas.

Q. What does it show? Will you please explain that?

A. It shows that the major dealers in these areas and the Sun dealers in these areas prevailing prices are within 1 cent of the majority of non-major stations in those areas during the times that the surveys were taken.

Q. Will you describe what you mean by non-majors?

A. By non-majors I refer to the service stations selling brands other than the major, more widely advertised brands.

Q. Would Super-Test be among the latter?

A. Super-Test would be a non-major.

Q. Is there anything else you wish to point out in connection with the document which has been marked Respondent's Exhibit No. 7 for identification?

A. This is not unusual for us to find markets for different periods of time where the majority of the stations are posting within 1 cent of the majority of non-majors.

* * * * * * *

Q. Mr. Childs, I hand you a document which is marked Respondent's Exhibit 8 for identification, "Florida Markets," and ask if you will please explain that to the Examiner, exactly what that shows?

[fol. 360] A. This is a similar piece of information covering various marketing areas in Florida, as you see, Miami, Lakeland, Plant City, Jacksonville, and so forth, and here we are making the same comparison to show that between 1953, when the first survey was made in this particular instance, and 1955 there were a number of instances where the Sun dealers or a majority of them and the majority of major dealers were posting within 1 cent of the greater portion of the non-major service station dealers.

Q. What period of time did that cover, Mr. Childs?

A. This survey that we have in this document is 1953, May 28, and the latest was taken in 1955, April 4.

Q. And these were taken under your jurisdiction?

A. These were analyzed under my jurisdiction. The studies were taken at various times by the people in the field in Jacksonville. They are normal surveys that we take in these markets and are usual market practices.

Q. Now, Mr. Childs, how did Sun price postings compare with the majority of the non-major regular gas postings as the result of those two surveys?

A. These surveys indicate that in these instances Sun generally was pricing within one cent of the non-major service stations in these areas. I am referring, of course, to the Sun——

Q. When you speak of Sun, what do you mean?

A. I am referring to the Sun dealers' price postings.

Q. Were these price surveys taken during price wars?

A. In the case of these Florida surveys, I noticed that two of them were taken during the depressed prices, the [fol. 361] Miami price and the last Jacksonville price were at 22.9 and 21.9, respectively, which would indicate these were during low price periods. The other would appear to be normal pricing.

. . . . . .

Q. Now, Mr. Crabtree, there is a map in front of you which has been marked Respondent's Exhibit 5, which is a map of the Jacksonville area around the 19th and Pearl Street location. What do the 12 diamonds on that map indicate?

A. The 12 diamonds are the locations of 12 Sunoco service stations.

Q. Was this map made under your direction?

A. It was. It was made by our statistical research department, but under my direction.

Q. What do the red overlay lines mean?

A. The red overlay lines indicate traffic flow.

Q. And how about the wider lines?

A. The width of the line indicates the traffic flow density.

Q. About where is 19th and Pearl on that map?

A. Approximately the center of the map, a little below the center.

Hearing Examiner Piper: 19th and Pearl?

The Witness: That is 19th and Pearl.

[fol. 362] By Mr. Henderson:

Q. Would you in your opinion, Mr. Childs, consider from that map that Pearl Street is a major traffic artery?

A. I wouldn't, not a major traffic artery in the sense that Main Street is a major traffic artery. Pearl Street, by the width of the line and the fact that the width carries out practically to the end and Pearl ends at the river, and the fact that it varies back and forth somewhat, would indicate that Pearl Street, while it carries a fair volume of traffic, carries largely local type traffic.

Q. What is the nature of the neighborhood around 19th and Pearl Street stations?

A. The neighborhood around 19th and Pearl is a low income type of neighborhood, largely residential.

Q. How many times have you been there, Mr. Childs?

A. I have spent quite a bit of time in Jacksonville, particularly in the last 18 months. We have been making a series of studies down there and so I have had occasion to be in Jacksonville—I haven't counted up—I think I have been to Florida something like 13 or 14 times in the last 18 months, and on most occasions I was in Jacksonville and in some cases for several days at a time, or in one case as many as ten days.

Q. Is it or is it not then an area of a low income type?

A. It is. I would say low income type.

Q. In your experience are there some well known market studies applying to motorists which the industry uses?

A. Yes, there are a number of such studies, studies that [fol. 363] we have used, or a study made by Alfred Politz research organization dating back to 1946 that was made for the Hearst publications.

Another study was made by du Pont, made for du Pont I should say—by National Analysts of Philadelphia, made in 1952.

We have made studies ourselves in our own organization, which throw some light on some of these characteristics.

Q. Are both the du Pont study and the Politz study in the Courtroom?

A. They are. The Politz study is a reproduction; the du Pont study is a popularized version.

Q. From your market studies or those used in the industry, what has been discussed as to the regularity of gas purchases at single stations?

A. These studies throw light on something that the industry that we in Sun well know, that the motorists are the gasoline buyers at the average service station and are made up in the majority of regular users of gasoline at that station. They generally patronize the same station. But the studies also show that in the neighborhood of 25 percent or more, slightly more, are what we call shifters. They buy when and where the whim strikes their fancy. Very frequently it is because they pass a gas station that they need gas, but those people have no particular preference and in many cases they have no brand preference.

Of those shifters a certain portion are highly price-conscious, that is, a small portion, but there appears among them a corps of highly price-conscious buyers.

Q. Now is this to your knowledge true of the Duval County area in Florida?

A. Yes, it would be true of that area.

Q. Approximately how large is this group of buyers which you say are highly price-conscious?

[fol. 364] A. Well, in the du Pont study the question is asked there of respondents and would indicate that the

highly price-conscious corps that I speak of would probably be in the neighborhood of 4 per cent of the 21,000 respondents that answered that particular survey.

. . . . . .

Q. Mr. Childs, on the basis of your experience, what percentage of the gasoline buyers are interested in price?

A. The percentage will vary. There are a hard core, a relatively small percentage, who are highly interested in price and they are continuously looking for low price. Beyond that the interest in price depends upon the circumstances or publicity given to low price, the size, the magnitude of the price differential between the normal price and other prices, and how far they must go to take advantage of such low prices.

Hearing Examiner Piper: He is speaking of figures. He asked you what per cent.

By Mr. Henderson:

Q. How big is this hard core in percentage, approximately?

A. From my information and experience it would be in the neighborhood of 3 to 5 per cent, 3 or 4, 5 per cent, somewhere in that neighborhood. It is something that varies by neighborhood. In a low income neighborhood we find a greater percentage, but the hard core would be in that magnitude.

[fol. 365] Q. Have you been familiar with the Super-Test station there at 19th and Pearl in Jacksonville since it started in 1955?

A. Shortly after it started.

Q. What steps, as far as you know, did it take to develop their business in that new station?

A. Super-Test used the commonly used methods of more rapidly developing volume in new service stations that is used by such outlets. They first utilized a low price, a lower than normal price, and they advertised that price extensively. They advertised it by newspapers and by point of sale methods, such as curb signs. I might add that the low price presented by Super-Test was frequently, in a number of instances it was 21.9 cents in a market

where the major oil company dealers were selling at 28.9; giving them a 7-cent price advantage.

* * * * * * *

Q. Do you have any figures on the circulation of the Florida Times-Union?

A. I did check with their advertising department and I do have some figures on that.

Q. Would you give them to us, please?

A. The figures cover the 12 months period. These are made by the ABC, a recognized bureau for measuring circulation, and the figures cover the 12 months period prior to March, 1956, ending on March 31, 1956.

These figures show that the circulation for the Florida Times-Union was 140,000 plus total, and that breaks down into Jacksonville city figures of about 81,000. Then the retail trade zone, which is the area outside of Jacksonville [fol. 366] city, but covering the more or less immediate shopping zone, the retail shopping zone, I believe they consider that as to some miles out from Jacksonville, of an additional 34,000 plus, and the balance of the circulation in other areas, which would be Daytona Beach and the balance of the area outside the so-called retail trading zone is the balance, or 25,000, with a total circulation of about 140,000 during the period of time we are talking about.

Q. During this time was or was not the prevailing price for the major brands of gasoline 28.9, if you recall?

A. I believe 28.9 was the prevailing price.

Q. Now, in your opinion would this newspaper advertising have any effect on the price-conscious buyers?

A. Yes, it would, on the same core, the small percentage of shifters would be influenced by the newspaper advertising. Some of those people travel considerable distances to buy their gas from their normal or local shopping area, and that small percentage would be affected by it.

Q. Is there any other advertising aside from the newspaper?

A. Yes, I think I mentioned Super-Test used in their introduction the point of sale advertising. I had in mind there price signs. Price of course is their immediate come-on and the curb signs that they use at the service station

are particularly effective in the immediate neighborhood of the station.

Other effects that develop is word of mouth advertising.

Q. What is the gallonage of the Duval County market?

A. About this particular season of the Year that we are talking about, the December and January sea- [fol. 367] son, the Duval County gallonage is approximately 10 million gallons. It will vary slightly between January and December, but about 10 million gallons.

Q. And for how long?

A. 10 million gallons a month.

Q. For those particular months you are speaking about?

A. Yes; December of 1955 was slightly in excess of 10 million gallons, and January, 1956, was not quite 10 million gallons. I believe it was 9,600,000 some odd.

Q. That is every brand?

A. That is the total taxable gallonage sold. That would be all of the figures that the State offers as to the gallonage sold by the suppliers in the Duval County area.

Q. You have testified that there is a certain shifter type buyer and that represented approximately 25 per cent and it would be about 2,500,000 gallons, would it not?

A. That is right.

Q. Even 1 per cent of this 2.5 million would be the equivalent of 25,000 gallons a month, would it not?

A. That is correct.

Q. Now, as to the stations which have lost the gallonage, is that or is it not equivalent to one-quarter of 1 per cent of the average station's business?

A. If you consider the average station statistically, the average station is approximately 20,000 gallons and one-quarter of 1 per cent of 20,000 gallons for the number of stations through the area would add up to the total we are talking about, so that would be true.

Mr. Wilson: Your Honor please, I am going to object to that question and answer, unless there is something in his [fol. 368] records as to the average gallonage of these stations. To my knowledge there is nothing in the records to date bearing on that.

Hearing Examiner Piper: What is the source of your information?

The Witness: As to the average gallonage, the average station in Jacksonville is doing less than 20,000, and the station of the magnitude of 20,000—and we are talking of that station—he would lose about a quarter of 1 per cent of his business if he lost at the rate that the average station would lose to these shifters in the area. The smaller station, of course, would lose proportionately a quarter of one per cent, on the same basis. He would lose less gallonage, but he would still represent a quarter of 1 per cent of his volume, the point being that if we take this total volume, that it might be assumed it would be attracted by the low price advertising and split that loss up among the stations in the area, the volume would account for about on the average a quarter of 1 per cent of the average dealer's business.

Hearing Examiner Piper: That who would attract, Super-Test?

The Witness: That this price advertisement could attract. We are assuming that they only attracted a small percentage of the highly price-conscious consumers.

Hearing Examiner Piper: Four per cent?

[fol. 369] The Witness: Four per cent is the amount of highly price conscious consumers; assuming the advertising was effective it could possibly attract one-quarter of that 4 per cent or 1 per cent, and that 1 per cent, when broken down among the service stations in the area is a very minute part of any service station's business.

Hearing Examiner Piper: I thought you were talking about one-quarter of 1 per cent.

The Witness: One-quarter of 1 per cent would be the loss that the average of all service stations might expect to lose statistically, on the basis of 25,000 gallons being so attracted. It is a statistical analysis based on assumptions that we would make, knowing approximately how effective such advertising would be.

Hearing Examiner Piper: Well, I lost you there somewhere. You started out with how many gallons?

The Witness: We started out with 10 million gallons and we say 25 per cent of this is represented by the so-called shifters, which is 2.5 million gallons.

Hearing Examiner Piper: Yes.

The Witness: Now, recognizing that advertising, such as

Super-Test was doing, might result in somewhere near the magnitude of 25,000 gallons——

[fol. 370] Hearing Examiner Piper: Just a minute. That is where I lose you. Where do you get that?

The Witness: Knowing from experience how effective such price advertising may be.

Hearing Examiner Piper: You mean you think that would be monthly gallonage?

The Witness: Well, somewhere in that magnitude might be their monthly gallonage attributable to the newspaper advertising.

Hearing Examiner Piper: It would not control the monthly gallonage?

The Witness: It would not.

Hearing Examiner Piper: Their excess?

The Witness: We are putting this high. We are trying to point to the maximum effect. We think it was probably considerably less than that attracted by the newspaper, but putting it high, we think if they attracted 1 per cent of this total shifter market they would be doing well with their newspaper advertising.

[fol. 371] Mr. Wilson: That is pure speculation.

Hearing Examiner Piper: It sounds like it to me.

It seems to me you are making a lot of assumptions here.

The Witness: Assumptions based on our knowledge of what happens in such cases.

Hearing Examiner Piper: Well, one assumption is that they will increase their gallonage 25,000 gallons as a result of their newspaper advertising.

The Witness: Over the period of time we were speaking about, they might attract as much as 25,000 gallons from such newspaper advertising.

Hearing Examiner Piper: In addition to what they normally sold?

The Witness: Well, they started new. This would be in addition to what might come to them from other sources, their point-of-sale advertising and such. They are starting from scratch.

Hearing Examiner Piper: Then where do you get the 1 per cent that you were using?

[fol. 372] The Witness: One per cent would be the per-

cent of the 2½ million that the 25,000 gallons would represent.

Hearing Examiner Piper: But you estimated 1 per cent of the 4 per cent of price conscious buyers?

The Witness: I said 1 per cent is a quarter of the 4 per cent of the price conscious buyers. That may be where the confusion is.

Hearing Examiner Piper: No. I mean——

The Witness: It comes from this 4 per cent of low price buyers.

Hearing Examiner Piper: And they represent the 25,000 gallons?

The Witness: That would represent the 25,000 gallons.

Hearing Examiner Piper: Is that just a coincidence that that is 1 per cent of 2,500,000?

The Witness: Well, this statistically would have to happen that way.

Hearing Examiner Piper: Then you do not have to assume the 25,000?

[fol. 373] The Witness: No.

Hearing Examiner Piper: If you assume that they would represent 1 per cent of the hard core price conscious buyers?

The Witness: Well, I think the assumption would be that they might pick up from such advertising the equivalent of 25,000 gallons a month in a reasonable period of time.

Hearing Examiner Piper: That has nothing to do with the percentage of the hard core of buyers?

The Witness: No; but working it backwards we find, in other words, we are justifying our reasoning and find our reasoning is correct in that we would expect to get a certain portion of these hard core buyers. In this case it amounts to 1 per cent.

Hearing Examiner Piper: I see. In other words, you arrive at the 1 percent because 25,000 is 1 per cent of 2½ million.

The Witness: In other words, the two check; one is an assumption that checks out in the other and it gives us credence to the assumption we make, which again is based on our knowledge.

[fol. 374] Hearing Examiner Piper: Then you step over to another assumption, and that is that the average gallon-

age of the other competing gasoline dealers is 20,000 a month?

The Witness: No, we are not making assumptions there. There we are basing it again on statistics. The average dealer, if he loses by and large across the board, would lose a quarter of 1 per cent. If he happens to be a 20,000 gallon station, then his proportionate loss would be 50 gallons.

Hearing Examiner Piper: Why would he lose one quarter of 1 per cent?

The Witness: From working it back, the total gallonage 25,000 on a 10,000,000 gallon market, is one quarter of 1 per cent, so a 20,000 gallon station——

Hearing Examiner Piper: Assuming it were a 20,000 gallon station?

The Witness: Yes. If it were a 10,000 gallon station it would lose 25 gallons a month.

Hearing Examiner Piper: But are you not assuming in that that the loss is spread all over the city?

The Witness: That is right.

[fol. 375] Hearing Examiner Piper: That is not true, though, is it?

The Witness: It isn't completely true; it will vary, of course.

Hearing Examiner Piper: I thought you started out with the theory that most of the buyers came from the neighborhood where the filling station was located. How would a guy on the other side of town lose any?

The Witness: Newspaper advertising causes that. We do know from experience that the shifters will go a considerable distance. We have made a number of studies on that.

Hearing Examiner Piper: All right.

He is just assuming 20,000 gallons. That does not make any difference.

The Witness: 20,000 was given there as an example of what it would mean to a dealer under average conditions in a 20,000-gallon station. A 10,000-gallon station dealer would proportionately lose half as much, but it still amounts to this one quarter of 1 per cent of business on the average.

Mr. Wilson: Is that 20,000 hypothetical?

Hearing Examiner Piper: That 20,000 is hypothetical.

[fol. 376] By Mr. Henderson:

Q. Now, Mr. Childs, how else would volume be attached to the Super-Test station, apart from the advertising in your opinion?

A. By the word-of-mouth advertising in the local neighborhood.

Q. How would this all affect the Sunoco station at 19th and Pearl Streets?

A. This would be particularly effective in drawing business to the Super-Test from the 19th and Pearl Sunoco station. The word-of-mouth advertising would be more effective in this neighborhood than in some neighborhoods because again we are dealing with a low-income-bracket neighborhood, a residential neighborhood where people within the neighborhood would be highly price conscious and therefore would be prone to talk about it among themselves with their neighbors, and some of the Sunoco 19th and Pearl Streets station customers would be exposed to this discussion and could be and would be influenced to try the Super-Test gasoline.

Q. From your knowledge of the situation, what effect did Super-Test's low price have on the Sun stations in the general area?

A. The effect of the Super-Test in the stations other than 19th and Pearl was not substantial. We have no evidence from any of our studies and from our experience that these stations would be affected to any great extent.

Q. You have indicated that the Sun station at 19th and Pearl would be affected.

A. Yes, sir.

Q. Now, based on your knowledge of the stations in the area and the experience of your company and the industry [fol. 377] relative to such matters, what are the factors that would cause this effect on that Sun station by Super-Test?

A. Well, the 19th and Pearl area is a low-price, low-income-bracket area. Therefore, your people that would normally be the patrons of the 19th and Pearl Sunoco station would be in that bracket and would be highly price conscious because of necessity. They would be more price conscious than the other average customers.

The Super-Test station and the McLean's Sunoco sta-

tion are both serving the identical same neighborhood. The word-of-mouth advertising would therefore, be particularly effective in shifting Sunoco 19th and Pearl Street customers to the Super-Test in getting them to try it because of what they would hear from their friends.

Also of prime effect is the price sign that was posted at the 19th and Pearl Street Super-Test station. This price sign was visual, easily readable to the customer in the Sunoco station, so the man buying gasoline at the McLean station couldn't help but make a comparison of the price that he was paying at the 28.9-cent price and the Super-Test price across the street. Therefore, he would be highly affected by this and tempted to switch the next time he bought gasoline.

Q. After the Sun station at 19th and Pearl started selling gasoline at a reduced price on December 27, 1955, the gallonage at that station increased considerably. Can you tell us why, in your opinion, this station experienced such a big volume increase?

A. Well, it is not unusual for Sun stations to increase their volume considerably under a low price or subnormal pricing. I think it is due partly to the fact that Sun [fol. 378] has always sold on the basis of value, more for your dollar, more miles per gallon, where our slogan has been "Premium gasoline at regular gasoline prices," and we have made the public conscious of the fact that at a Sun station they will get price value.

In this particular instance the Super-Test newspaper advertising had brought customers from a wide area, small numbers from varying areas, but when they all got into this 19th and Pearl area and were attracted to this area, you brought in a great many people from wide areas who were looking for price. Some of those people when they came to this particular corner and saw the Sun station with the lower price would be attracted into the Sun station rather than the Super-Test station.

In the immediate area, because of the price signs and the word-of-mouth advertising, you had a very great awareness of low price, so as soon as this Sun station did drop its price it attracted many people who had become aware of this particular low price area.

Q. How about premium gas buyers?

A. Sun always attracts some plus business with the low price from the people who normally buy a major brand of premium. As I said before, we have always advertised premium gasoline at regular price. Under normal conditions some of these people would not switch from their major brand premium to a Sun station where the saving was 3 cents, but when they find the differential is 6 cents, it is too great for them to overlook, so we pick up some plus business from those who otherwise would be buying a major brand premium.

[fol. 379] Hearing Examiner Piper: How far away from *19th and Pearl was the nearest station, not Sun Oil but* any station?

The Witness: There was another non-major station right next to 19th and Pearl.

Hearing Examiner Piper: Did he enter into this picture?

The Witness: He did, he reduced his price to meet Super-Test, so actually the 19th and Pearl Sun station was flanked by two non-majors with these low prices. I believe it was Red Arrow, if I remember correctly, or Royal Arrow, and that station is not there now.

Hearing Examiner Piper: And when McLean came down they all had low prices?

The Witness: The Red Arrow followed Super-Test.

Hearing Examiner Piper: How far away from them was the next corner where they had gasoline stations?

The Witness: Oh, within a block or two there were several other stations.

Hearing Examiner Piper: Majors?

[fol. 380] The Witness: Yes.

Hearing Examiner Piper: Did any of them come down?

The Witness: I believe not.

Hearing Examiner Piper: All right.

By Mr. Henderson:

Q. Would you anticipate that the January gasoline sales would be a high-volume month in this Jacksonville area?

A. Actually seasonally January is not as high as December.

Q. Have you investigated the figures, Mr. Childs, and if so, what are they?

A. I have studied the tax figures. These are figures based on taxes as published by the State, and in analyzing those figures it shows that in 1956, January was 6.8 per cent less in total volume sold in Duval County than in December, 1955.

Q. From where did you procure that information?

A. That is published in the State Taxable gallonage figures.

. . . . . .

Q. Mr. Childs, what happened to the gasoline sales in February, 1956, in the area under discussion, and I am talking about 19th and Pearl.

[fol. 381] A. In the Duval County area the gasoline volume increased in February because in the latter part of the month there was a price war throughout this entire area.

Q. Would this price war have its effect during March, 1956?

A. Yes, it would.

Q. Did it or not motivate most of the stations in Duval County to sell gasoline at reduced prices during the entire month of March, do you know?

A. I understand that is right. The records will show that during March practically all of the stations in this area were selling at reduced prices.

Q. Do you have information as to what happened to the gallonage in this area during March?

A. Yes, again from the taxable gallonage figures we find that in March, as compared with January, the increased volume in Duval County was 28½ per cent.

. . . . . .

Q. Did the Sun stations in Duval County increase at that rate?

A. Actually the Sun stations in Duval County increased at about twice this rate. About 55 per cent is the increase, in total, to the Sun stations in Duval County in March 1956 against January 1956, which again illustrates the point

that the Sun stations increase at a greater rate with a low price than the average competitive stations do.

Mr. Wilson: I did not hear that.

[fol. 382] The Witness: It illustrates the point that Sun stations increase at a greater rate with low prices than the average competitive stations do.

Mr. Wilson: Your Honor, I ask that that last part be stricken as entirely a conclusion on the part of the witness.

Hearing Examiner Piper: That is the first time I have heard that. Have you said that before?

The Witness: In my earlier testimony I said that because of our price value we do gain considerable. I did mention it there in conjunction with the testimony I gave before.

Hearing Examiner Piper: I could see how you could gain if you cut your prices and the rest did not, but during a general price war I do not see how you are any better off competitively than anybody else.

The Witness: Our studies would indicate that it is due to the fact—to several facts, but one that seems to have the big effect on it is the premium buyer who shifts because frequently the premium doesn't reduce.

Hearing Examiner Piper: That is just what I was going to get at. During a general price war the premium gas is not down, necessarily?

[fol. 383] The Witness: Not necessarily.

Hearing Examiner Piper: The price war is in the so-called regular grades?

The Witness: Generally; mostly.

Hearing Examiner Piper: Well, that is logical. You said that before.

By Mr. Henderson:

Q. Is it or is it not a fact, or are you testifying as a fact that the total gallonage of Sun stations was up some 55 per cent in March over the same stations total business in January, 1956?

A. That is right.

Q. What happened in the big increase in volume at the 19th and Pearl Sun station when all Sun and all other competitive stations in the area were selling at the same low price?

A. Despite the fact that all the other stations were selling at the same competitive low price, the 19th and Pearl Street station still maintained their big increase over their previous December gallonage. Actually, the gallonage at 19th and Pearl was better than 19,000 gallons during March.

Q. Did any other Sun stations have a high volume increase after the price dropped in the middle of February, 1956?

A. Yes. Most all the stations had considerable increase. One example that I recall is Mr. Crabtree's station at Main and Tallulah where the increase in March, again compared [fol. 384] with January, increased in volume about 250 per cent. That was despite the fact that all other stations in the area were matching his price.

Q. Mr. Childs, were there Sun dealers in Jacksonville with non-major competitors close by, other than the 19th and Pearl Street station?

A. Yes, there were.

Q. Now, Mr. Childs, I show you a document which has been marked as Respondent's Exhibit 12 for identification, and ask you what it is.

A. This is a compilation or a listing of stations operated by Sun in Duval County, showing the stations in that area that have a non-major brand competitive station within three blocks or less of the Sun location.

Q. Did Sun give any price assistance to these Sun dealers that appear on Respondent's Exhibit 12 during December of 1955?

A. Other than the 19th and Pearl Street station which is listed here, Sun gave assistance to no other Sun station.

* * * * * * *

WILLARD W. WRIGHT, resumed the witness stand and having been previously duly sworn, testified further as follows:

Direct examination—resumed.

Mr. Henderson:

Your Honor please, there are some apparent obvious errors here in the transcript of testimony and I am just going to ask Mr. Wright in connection with four of them.

[fol. 385] By Mr. Henderson:

Q. On line 12, page 491, the question was:

"When you speak of a divided station, you mean one that sells more than one brand of gasoline?"

The answer was "Yes, sir." I might say that this handling of gasoline through divided stations proved to be extremely economical."

Did you mean divided?

A. Would you ask that again, Mr. Henderson? I think you said when you speak—

Q. When you speak of divided stations, you mean one that sells more than one brand of gasoline, and you say yes.

A. Yes.

Q. Then you say, "I might say that this handling of gasoline through divided stations proved to be extremely economical."

A. I mean undivided stations.

Q. In other words, instead of the word "divided" it should be "undivided"?

A. It should have been undivided.

Q. 491, line 12.

Mr. Wilson: Line 19?

Mr. Henderson: What is the fourth line from the bottom of the page.

Mr. Wilson: Yes, sir.

By Mr. Henderson:

Q. On page 495——

[fol. 386] Mr. Wilson: Mr. Henderson, may I interrupt there? On 491 I think we have another error of the same type, on line 15, where he says:

"The impact of the turning was very definitely felt by the undivided service station and in order to protect himself he started to handle a branded product in an undivided manner."

Should that be "divided"?

The Witness: Divided.

Mr. Wilson: Should that be "by the divided"?

The Witness: Yes, sir. The impact of this turning was very definitely felt by the divided service station.

By Mr. Henderson:

Q. In other words, that is the correction?

A. That is right.

Q. Thank you.

Now, on page 495, at the sixth line from the bottom of the page, the question was:

"How about the question of the maintenance of the stock required to supply the needs of the motorist? Who maintains that?

"Answer: Very definitely it is the motorist who maintains the stock of the service station."

A. Of course, that is wrong. It should have been "The supplier maintains."

[fol. 387] Q. In other words, the word "supplier" should be inserted where the word "motorist" is?

A. Yes, sir.

Q. In other words, he maintains the stock of the service station?

A. Yes, sir.

Q. Now on 499, on the second line, this is the statement that I made:

"He just a moment ago spoke about the Objective Development Plan, and first I am going to ask him what that is. Then they have a Franchise Plan, and I am going to ask him what that is, and then they have" it says here

"the Little Sun Story," and this is really what I said, "The Sun Story."

Would you mind deleting the "Little", Mr. Wilson? This is supposed to be a statement by me, "which are contained in these various documents." That is the second line, where "Little" goes out.

Now on page—it is just "Sonoco Story," is what it is.

Now on page 501, line 10, the question:

"Now, the Sunoco Story in 1956.

"Answer: The Sun franchise is a later addition" it has here "addition of the Sunoco Story which is, I think, done a little better, but the essential parts are there."

It says here "Sunoco franchise."

"The Sun franchise is a later addition to the Sunoco Story."

[fol. 388] By Mr. Henderson:

Q. Now, what are the facts, Mr. Wright?

A. I believe actually the Sunoco Story was brought out after the Sunoco Franchise. I just reversed the order in which they appeared.

Mr. Henderson: Thank you very much.

By Mr. Henderson:

Q. Should not this be "edition" instead of "addition"?

A. "Edition."

Mr. Henderson: All right, Mr. Wilson, you may cross-examine.

Mr. Wilson: If Your Honor please, as long as we are in the process of correcting the record, I think sometimes it is much better to do it like this on the record that it is to try and get together later, because then you may have, as time has gone by, some dispute as to what was meant, so I would like to just make two or three corrections also.

Beginning on page 482, line 13,—this was in the argument on the motion to dismiss in my answer to Mr. Emmerglick. I say:

"Now, it is true, as Mr. Emmerglick said, that the Seventh Circuit refers to the Enterprise case."

As a matter of fact that should be—perhaps Mrs. Wick misunderstood me—because it should be Second, and that [fol. 389] sounds a lot like Seventh. It should be the Second Circuit reversed the Enterprise case.

Hearing Examiner Piper: That is right. I know that to be a fact.

"Mr. Wilson: Yes, sir. And that should read like this:

"—but if Your Honor please, it did not reserve it on the merits; it reversed it merely because as the Court said, the district Court's measurement of damages was all wrong."

Now on page 483, line 19:

"Mr. Wilson: No significance, except that of pleading the statute with the actual facts."

That was in response to your question "Is there any significance" in the way we have pleaded Paragraph Four of the complaint.

And then down at the bottom of the page the word "method" appears, and actually—this is in line 25—this line should be read "magic", and that takes care of my corrections.

Hearing Examiner Piper: I will treat the comments of both counsel as a motion to correct the record and the motion is granted.

Cross-examination.

By Mr. Wilson:

Q. Now, Mr. Wright, as I read your testimony last night, this is your thirty-fifth year with the Sun Oil Company?

[fol. 390] A. That is right.

Q. Now, we have been talking here in the rest of this record about divided and undivided stations. I would like for you to be a little more explicit about that, as to the difference between a divided and an undivided station.

A. A divided station in our definition is a station that handles the gasoline sold by more than one supplier. An

undivided station would be a station that handles the gasoline sold by only one supplier.

Q. And then am I right that a divided station is one, we shall say, that perhaps sells Gulf, Texaco, Standard, American, perhaps two or more of those gasolines, in comparison with an undivided station which merely sold Sunoco or Pure or Texaco or Esso?

A. Yes.

Q. Isn't it true, Mr. Wright, that in comparison to the number of undivided stations that the number of divided stations is quite small throughout this country?

A. A comparison of divided stations to undivided stations in the country is quite small.

Q. Would you say, Mr. Wright, that the number of divided stations as compared to the number of undivided stations, is practically insignificant?

A. Yes.

Q. A very small number of them?

A. Very small.

Q. Now, I believe you testified that there is an emphasis by a company to sell its brand name to the public. I believe you referred to it as public acceptance, did you not?

A. Yes, I did.

Q. Every major oil supplier attempts to do that, does it not?

[fol. 391] A. That is right.

Q. And I believe you testified that is done through various advertising media and through other ways in addition?

A. Yes.

Q. So isn't it true, Mr. Wright, that at all times under present day marketing situations, that the public is conscious of certain well known brand names?

A. Yes.

Q. And would you care to describe for the record those brand names that you feel presently have great public acceptance?

A. In what area?

Q. In the various areas in which the Sun Oil Company competes.

A. Well, in New England we would have Socony, Mobile,

Esso, Gulf, Texas, Jenney, Calso, Lincoln Oil—I may have missed some of the companies.

Q. Would Shell be one of them?

A. Yes, Shell would be one of them.

Q. Would Amoco be one of them?

A. American Oil would be one of them, yes.

Q. When you say Calso, isn't that the California Oil Company?

A. That is the trade mark of the California Oil Company in New England.

In Springfield it would be Hamden Oil Company. In Hartford, it would be the Laurel Oil Company. I think that covers the majority of the companies. There are other companies that have local acceptance for their brands, but at this moment I don't recall them.

Q. Did you include Sun Oil Company among those?

A. Well, I would be very glad to. If I omitted it I would like to put it in.

[fol. 392] Q. Sun Oil Company is included?

A. Yes, Sun Oil is included.

Q. And how again, in your own words, without my paraphrasing it, Mr. Wright, do these companies obtain this public acceptance granted to gasoline?

A. These companies obtain their public acceptance of these brands of gasoline by advertising through practically all media; also by having their stations distinctively marked and by having the proper operation of their service stations.

Q. Now, is this advertising that you speak of in the form of national advertising?

A. Not necessarily. Some of these companies that I mentioned use local advertising.

Q. Does Sunoco use national advertising?

A. No—now, you will have to define "national advertising."

Q. What is the media in which the Sun Oil Company presently advertises its Blue Sunoco Gasoline?

A. We use newspapers; we use a restricted chain of radio; we use point of sale advertising; we use dealer handouts; we use billboards in the area in which we operate. I think they are the five.

Q. Do you use the television media?

A. We use television in a very restricted sense, spots on television from time to time.

Q. Do you do this through your own advertising department, or is it done by your dealers, or is there a combination, an advertising allowance, shall we say, given to your dealers and they pay part of the advertising?

A. We do the advertising I spoke of through our advertising agency under the direction of the advertising department.

[fol. 393] Q. Do you grant an advertising allowance to any of your dealers for advertising purposes in localities in which they operate?

A. Not to our retail dealers.

Q. That is all done through the head or main office, so to speak?

A. That is all done through the advertising department.

Q. And this is carried out in all the areas in which Sun Oil Company sells its gasoline?

A. No.

Q. Are there any areas where you do not advertise?

A. No. Where we have distributors, then it is handled on a different basis.

Q. Then, for instance, I believe you have a Mr. Cox over here in Delaware, do you not?

A. In the Delaware Peninsula.

Q. He is a distributor?

A. He is a distributor.

Q. Do you have under the contract with Mr. Cox do you allow him so much for advertising purposes?

A. Yes, he has a definite advertising allowance.

Q. And does Mr. Cox use his name in connection with the advertising or does he use the Sun Oil Company?

A. I have never seen a Cox Distributing Company advertisement. I have seen other distributors in which they identify themselves as distributors, so I would have to answer on Cox I don't know.

Q. As distributors do they advertise as distributors of Sun Oil Company?

A. Sun Oil.

Q. But Sun Oil Company is not in there before the public at all?

[fol. 394] A. It might be, although we would accept their

advertising if they just used their corporate name or the name under which they operate.

Q. But you would rather use Sun Oil Company, I think, would you not?

A. Would we rather?

Q. Yes, sir.

A. We are always interested in publicity.

Q. That is the purpose of your advertising, is it not?

A. Not necessarily. The purpose of our advertising is to sell the product.

Q. But the purpose of it is to push your gasoline?

A. To sell gasoline and other products.

Q. Now, I want you to define in your own language, Mr. Wright, what you mean by the term "public acceptance."

A. Public acceptance would be having developed in the minds of the public a desire to buy the particular product being referred to and with public acceptance is a connotation of the fact that they do buy that particular product.

Q. Would you say from your experience in this industry that the word "Esso" has public acceptance in localities in which it is sold?

A. Oh, yes.

Q. Would that be true of Texaco?

A. Yes.

Q. Shell?

A. Yes.

Q. Pure?

A. Yes.

Q. Blue Sunoco?

A. Yes.

[fol. 395] Q. In other words, the brand name products of the major gasoline suppliers——

A. Have public acceptance to different degrees.

Q. Have you ever determined, Mr. Wright, from the gallonage point of view what the public acceptance of Blue Sunoco means to your company over that of a gasoline that is unbranded and has more or less a local brand name?

A. Would you ask that question again?

Q. Have you ever determined the value to the Sun Oil Company that is inherent in the public acceptance

that has been accorded to Blue Sunoco as compared to that of an unbranded locally known gasoline?

A. No, because it is not that simple.

Q. Have you ever heard of a gasoline called Metro?

A. Metro?

Q. Yes.

A. Yes, I have heard of a gasoline called Metro.

Q. Would that be one of the unbranded gasolines, in your opinion?

A. No.

Q. It would be a branded?

A. Well, it certainly is a branded gasoline.

Q. Does the term Metro have public acceptance?

A. Metro has public acceptance in the areas in which it is marketed.

Q. You mentioned the gasoline that is sold by the Jenney Stations.

A. Yes.

Q. What type of gasoline did they sell?

A. When I was more intimately acquainted with their operations they sold two gasolines, Jenney Regular and Jenney 100. I have since understood that they have added [fol. 396] what in the trade they call a super premium, although I have had no verification of that, because I haven't been back to New England.

Q. Where is their area of competition?

A. They market in New England, principally Massachusetts, Rhode Island, the lower end of New Hampshire and Maine.

Q. Are they competitors of your gasoline?

A. Yes.

Q. Are they sold under the name Jenney?

A. Yes.

Q. In your opinion, does the word Jenney have the same public acceptance as Blue Sunoco in those areas?

A. Very, very close to it, if not equal to it.

Q. Does Jenney sell its gasoline at the same price as Blue Sunoco in its stations in that area?

A. I would imagine that most of their dealers are selling at a price close to or equal to the price of the dealers handling Blue Sunoco.

Q. What do you mean by "close to"?

A. Because Mr. Wilson, there is no area in which I have found that all dealers are selling gasoline at the same price. There is price variation in areas.

Q. Now, I was just about to ask that, because that has been bothering me, too, Mr. Wright, because on Respondent's Exhibit 8, for example, in Lakeland, the percentage of non-majors at this prevailing price is listed as 100 per cent. At Plant City, Florida, every station in Plant City, Florida, is selling at 28.9, 100 per cent.

Mr. Henderson: Mr. Examiner, may we give the exhibit to the witness so he knows what he is talking about?

[fol. 397] Hearing Examiner Piper: Yes. He is talking about your dealers in Plant City.

Mr. Wilson: I am talking about non-majors. I am not talking about Sun, because he just made the statement that he doesn't know, but that in his opinion in these areas the stations do not sell at the same price.

Hearing Examiner Piper: Oh.

The Witness: I don't believe that was the question that was asked me. I believe the question that was asked me was were the Jenney stations in Massachusetts selling at the same price as Sunoco stations and I indicated that I would be surprised if all Jenney stations and all Sun stations in competitive areas were selling at the same price.

By Mr. Wilson:

Q. Now, Mr. Wright, I am going to ask you the $64,000 question. Why would it be any differe in that area then it would be Lakeland, Plant City, Bradenton, Lakeland, Bradenton again. Of course, these are in other months——

Mr. Henderson: Are you referring to——

Mr. Wilson. Excuse me. I wish to omit the last Bradenton and add instead Plant City.

[fol. 398] Mr. Henderson: Now, do you understand what the question is? You were speaking about Jenney before, but are we comparing to anybody now? What is the question?

Mr. Wilson: Would you read the explanatory remark to my earlier question?

Mr. Henderson: I am only asking for the question which

is now being asked the witness, the reason he asked for that.

Hearing Examiner Piper: The question assumes something that he just said.

Mr. Henderson: My statement, we do not understand the question. I would like to know what the question is that is being asked. I do not understand the question.

Mr. Wilson: Let me see if I can help you, Mr. Henderson.

Mr. Henderson: And help the witness at the same time.

Mr. Wilson: Mr. Wright in response to my question as to the Jenney Stations enlarged on that and said that he hasn't found in his experience in the area in which Sun was competing that these stations would all sell at the same price. Now, Mr. Wright originally made a very large statement. He then said that wasn't my question [fol. 2891] and on his next answer he restricted it to the Jenney stations, and I will accept that restriction if he so desires. So then I asked him this, why would it be any different in-so-far as the particular situation connected with Jenney Stations and Sun Oil Company was concerned and these areas in Florida that I named, and I will ask him to answer that question.

The Witness: The difference of course is in the size of the areas involved. The Jenney Stations, as I said before, cover an area in Massachusetts, Rhode Island, and the lower section of New Hampshire and maybe of Maine, part of Maine I believe. In that area there are many different price situations which have arisen from time to time. We have historically had bad prices brought about in East Boston, which are rather well known and which have a tendency to depress the East Boston market and the areas adjacent thereto. We have other locations or other sections of this marketing area that have historically always enjoyed fairly normal or prices which have not been disturbed because of price conditions, and in the Jenney area there may be as high a differential between the low and the high postings of Jenney Stations and some stations as maybe 6 or 7 cents a gallon, but there are large geographic areas involved.

You now called my attention to Lakeland, which is a very small compact little area. The same thing is true

with Plant City. I am not sure whether we have—well, I know we only have one dealer in Plant City. Whatever he posts, that is 100 per cent of the dealers in Plant City.

In Bradenton, if memory serves me correctly, we have two, maybe three dealers.

[fol. 400] In the area involved in the Jenney market we may have 500 dealers involved, scattered over this wide area.

By Mr. Wilson:

Q. Now, then in the Lakeland or Bradenton areas, Mr. Wright, didn't you find down there when you conducted this survey that some of these unbranded gasolines were selling at a high or a differential between that brand and other gasolines as high as 5 cents and perhaps as low as 1 or 2 cents?

A. Mr. Wilson, I conducted no survey.

Q. You didn't have anything to do with the survey that was conducted in the cities and towns in Florida represented by Respondent's Exhibit 8?

A. I would not conduct such a survey. The results of such a survey may or may not come to my office, depending upon what action the field suggested be taken.

Q. Well, I am going to ask you, Mr. Wright, in your experience—you have been 38 years in this business?

A. No.

Q. You haven't been 38 years with Sun Oil Company?

A. No 35.

Q. I stand corrected. You have been in this business 35 years and you have done quite a bit of traveling in the areas in which the Sun Oil Company competes, have you not?

A. I have.

Q. Have you ever, in traveling through those areas, observed that in every instance, and I am certain in your position you would observe postings of various gasoline stations—have you ever observed that all stations have the same posted prices?

[fol. 401] A. In the area in which I was then located or looking?

Q. Yes.

A. Yes.

Q. Where was that?

A. I have seen it happen in Worcester; I have seen it happen in Providence for a short period of time. I have seen it—now, I am talking Sun Stations, because—and I would like to make this clear—the non-majors in those areas would not be posting the same price and I took from your question that you meant Sun Station when you asked that question.

Q. No, sir. I meant just as you explained it later. You answered my question then when you said non-majors in those areas did not post the same price.

A. Generally the non-majors are not posting the same price as the major companies.

Q. And that has been true, has it not, Mr. Wright, throughout your travels?

A. My observation would say yes.

Hearing Examiner Piper: Have you told us what you mean by "non-major"?

The Witness: Well, I believe people use the word "independents." By non-major I am referring to a non-integrated company, one who does not perform most all of the features of refining and marketing gasoline. My own definition is one who purchases his gasoline from a refiner or even may have a small refinery and purchases crude.

Hearing Examiner Piper: Which is Jenney?

[fol. 402] The Witness: Jenney buys their gasoline from a refiner.

Hearing Examiner Piper: They are not a refiner?

The Witness: Well, it is hard to define, because they are so large and such an important operator in that particular section of New England in which they operate that they have won for themselves or had for themselves the same status as a major operator, although in my definition I would think of them as a non-major.

By Mr. Wilson:

Q. As a matter of fact, Mr. Wright, have you in your long experience ever visited or observed the situation in a city where the non-majors posted the same price as the majors?

A. Yes, sir. During a period of time in New Jersey——

Q. I am going to stop you right there now. Is that because there was the McGuire Act; were those fair trade prices?

A. No.

Mr. Henderson: Mr. Examiner, he should be permitted to finish his answer.

Mr. Wilson: I am sorry.

The Witness: You asked me where in my travels I have observed, as I understand the question, where I have observed non-majors and majors posted the same price. I [fol. 403] observed it in sections of New Jersey; I have observed it in sections of New England and I have observed it in some of the western parts of our operation.

By Mr. Wilson:

Q. Was that a temporary thing, Mr. Wright?

A. Advantage?

Q. No, was that a temporary event?

A. Oh, event.

Q. This same posting.

A. Yes.

Q. How long would you estimate that that lasted?

A. Different periods of time, but of relatively short duration.

Q. Was there a price war going on in those areas?

A. Yes.

Q. I will now ask you, Mr. Wright, whether or not in the sale of Blue Sunoco gasoline the Sun Oil can compete at the same price with the gasolines sold under the brand names Esso, Texaco, Shell, American, et cetera?

Mr. Henderson: Is that limited to any territory or just generally?

Mr. Wilson: I can only speak of the areas in which Sun Oil competes.

A. Yes, we compete generally at the same relative prices.

By Mr. Wilson:

Q. Isn't it true, Mr. Wright, that Blue Sunoco is universally sold at a lower price than premium gasolines and

[fol. 404] when I say premium, I don't mean the super premium, but premium gasolines of the major gasoline companies?

A. Just maybe a cent over that of the house brand.

Q. Over that of whose house brand?

A. The major oil companies house brand.

Hearing Examiner Piper: The regular brands?

The Witness: Are you talking about the regular house brands?

By Mr. Wilson:

Q. The regular house brands of the major oil companies.

A. No. I would say that the majority of our dealer postings would be equal to the majority of the dealer postings of competitive major companies on their house brands.

Q. But substantially lower than their premium brands?

A. The differential is substantially—I mean the price, not the differential—the price is——

Q. Don't your more or less in the sale of Blue Sunoco occupy the middle ground in your posted prices between regular or house brands of gasoline of major oil companies and their premium grades?

A. No, sir; not on price.

Q. That is what I am talking about.

A. Not on price.

Q. Isn't it true that Blue Sunoco's posted prices are generally a cent or more higher than the posted prices of the major brands of gasoline?

[fol. 405] Mr. Henderson: I don't like to object, but he has already answered and that is the same question and he got the same answer. Here it is again. It is repetition.

A. No.

By Mr. Wilson:

Q. Your answer is no?

Hearing Examiner Piper: As a matter of fact, it is the third time.

Mr. Wilson: Maybe I should swear myself in as a witness, but wherever I have seen the Blue Sunoco sign it is a cent or so higher than the regular house brands.

By Mr. Wilson:

Q. Don't you advertise, Mr. Wright, Blue Sunoco is a premium gas being sold at the lower price?

A. We advertise that Blue Sunoco is a premium gas selling at regular gas prices.

Q. What is the octane rating of Blue Sunoco?

A. At the present time 94.

Q. What is the octane rating of Gulf No-Nox Gas? Is that the regular gasoline?

A. No, I think that is their premium gasoline, Mr. Wilson.

Q. I think you are right.

Hearing Examiner Piper: They have two grades. It is their high test.

The Witness: They now have three grades.

[fol. 406] By Mr. Wilson:

Q. There is Good Gulf Gulf. What is the octane rating of Good Gulf?

A. Good Gulf and I believe it is around 92 octane, although I haven't recently referred to their octane.

Q. What is the octane rating of their No-Nox brand?

A. The last time I saw figures that registered with me it was 96.

. . . . . .

By Mr. Wilson:

Q. From your experience, Mr. Wright, would gasoline having an octane rating of 92 or less compete pricewise with a gasoline having an octane rating of 94 plus?

Mr. Henderson: Now, Your Honor please, I object to that. If he wants to test this man's credibility it is one thing, but where does it enter this particular case, the fact that someone sells an octane rating of 60 or 90 or 80 or 105, where it is germane, where it is relevant in this particular case? I object to it.

Hearing Examiner Piper: I can see some relevance to it. You may answer.

The Witness: May I answer the question?

Hearing Examiner Piper: Yes

[fol. 407] The Witness: My experience is they have quite successfully competed in the market. A company marketing 92½ octane gasoline is quite successfully competing with gasoline of higher octane value than 92.

By Mr. Wilson:

Q. At the same price?

A. At the same price.

Mr. Henderson: Just that I may understand, you speak about a higher octane value. Do you mean rating or do you mean value?

The Witness: Mr. Henderson, we speak of gasoline as octane value in our company. Some people, some places may speak of it as octane rating. I think the two are synonymous.

Mr. Henderson: Very well.

By Mr. Wilson:

Q. Is there regular gasoline having octane ratings as low as 87 or 87½?

A. I don't recall a gasoline that low.

Q. Could a gasoline with an octane rating of 87 or 87½ compete at the same price with a gasoline of 92 or 94 octane, selling under a well known brand name that has public acceptance?

A. An 87½ octane value gasoline will service a certain number of cars entirely satisfactorily. The cars that can [fol. 408] use 87½ octane would notice no appreciable or any improvement in performance if they bought a 92 or a 94 octane gasoline. As you go up in octane value you increase the percentage of cars that you can service up to a point where the octane increases tend to lose their relative importance, as you get higher in the octane scale.

Q. Then I understand your answer to my question to be that the company that is selling the higher octane gaso-

line in competition with a company selling 87 octane gasoline would have a competitive advantage?

A. A quality advantage in gasoline. It would have a quality advantage.

Q. Well, that would be reflected competitively, would it not?

A. There are other factors in the sale of gasoline other than the quality of the gasoline which would have to be taken into consideration.

* * * * * * *

Q. Then there are other factors that enter into the competitive picture other than price, isn't that correct, Mr. Wright?

A. Yes, there are other factors that enter into the picture; yes.

Q. In other words, your Sunoco station at 19th and Pearl had facilities that his Super-Test station did not have?

A. I believe, yes; it is an integrated station.

Q. I don't know what integrated means, but please answer my question. Doesn't your station at 19th and Pearl have facilities that this station, this Super-Test station, does not have?

[fol. 408] A. Yes.

Q. And therefore is it not true that on a comparative price basis patrons would be induced to go to your Blue Sunoco station rather than to the Super-Test unless it were for a difference in price?

A. Yes.

Q. That is true, is it not, Mr. Wright, where these unbranded stations similar to the station at 19th and Pearl are selling gasoline and they are in competition with stations such as yours and that have many more facilities for the motorist than do the stations that pricewise they would have difficulty in competing?

Mr. Henderson: Who would have the difficulty?

A. Who.

By Mr. Wilson:

Q. The unbranded stations.

A. Will you restate that question?

Mr. Wilson: Strike that.

By Mr. Wilson:

Q. I say isn't it true then that those stations selling unbranded gasoline that do not have—strike that, too.

Do those stations selling unbranded gasoline that do not have the same facilities for the motorists as do your integrated Blue Sunoco stations would be at a competitive disadvantage pricewise if they sold the gasoline at the same price, is that correct?

A. You are now referring to a lower octane gasoline?

[fol. 410] Q. I am referring to an unbranded gasoline.

A. No. Then I would have to say no, that isn't true.

Q. Would it be true if they were selling a lower octane gasoline?

A. Yes.

Q. Now, this Super-Test gasoline, according to this advertisement, is 87½ octane.

A. That is right.

Q. Your gasoline is 92 octane?

A. 94.

Q. 94. I am sorry. Therefore in addition to the facilities available to the motorist at 19th and Pearl there is a factor of a difference in the gasoline, the quality of the gasoline sold, which would also be reflected competively, am I correct?

A. We have better quality gasoline.

Q. And that is another reason, is it not, Mr. Wright, that in order to compete this type of gasoline must of necessity be sold at a lower price?

A. Yes.

Q. And it is also true, is it not, that if you had—assuming that you had an unbranded gasoline station selling a gasoline of 94 octane in a station that did not have the facilities that your integrated station has; wouldn't they also in order to compete have to sell their gasoline at a lower price?

A. It depends on what you mean by facilities. If you

mean by facilities lubritoriums, then I might not be able to say yes to that question, because we find that case of entrance, driveways, factors of that kind are a greater factor in the sale of gasoline than are the facilities which we talk about as lubritoriums and baths. Those are particularly helpful in building up the good will factors, but not in building the gasoline.

[fol. 411] Q. Wouldn't the absence of rest rooms in a station in a locality like 19th and Pearl have a deliterious effect in competition with a station across the street that had a better product or we will say a similar product that did have these facilities for the convenience of the motorist? Wouldn't that make a difference?

A. Not as great a difference as it would be if it was a highway station. I would feel that absence of rest rooms would to some degree affect the patronage of the station.

Q. Then that would be a factor that could necessarily be reflected pricewise, could it not, if the gasolines were of a similar quality?

A. If one station had proper and adequate rest rooms and the gasoline was the same quality, all other factors were equal, I would say to a very limited extent on that kind of a station.

Q. But it would have some effect?

A. Yes.

Q. It must be taken into consideration?

A. Yes.

Hearing Examiner Piper: In many of counsel's questions he has asked you about an un-branded brand of gasoline. As I understand your definition, there is no such gasoline. Every gasoline that has a name you call branded?

The Witness: That is right, Mr. Examiner, I accepted his usage of the word "unbranded."

Hearing Examiner Piper: What would you call them?

[fol. 412] The Witness: I would call them non-major gasolines.

Hearing Examiner Piper: But in answer to my question before you defined a non-major as one that does not have a refinery but buys from somebody else.

The Witness: But I didn't say, sir, that they did not put a brand on it.

Hearing Examiner Piper: No, but that is what you call a non-major?

The Witness: That's what I call a non major.

Hearing Examiner Piper: Then these exhibits of respondent indicate that most cases the non-majors sell at a lower price than the majors in these surveys.

The Witness: Are you referring to this? I only have one.

Hearing Examiner Piper: They have got a survey in Florida and then they have got a survey in Philadelphia and several other places. But in both of them they indicate the major dealers are within 1 cent on this——

Mr. Henderson: Which do you have, Mr. Wright?

[fol. 413] The Witness: 10.

I don't see any postings for the non-majors. I see over here "Per cent of dealers within 1 cent."

Mr. Henderson: Do you have Respondent's Exhibit 8 or Respondent's Exhibit 10?

The Witness: There is nothing on this to indicate what it is.

Mr. Henderson: That is Respondent's Exhibit 8.

Hearing Examiner Piper: The only point that is bothering me here is this evidence introduced by respondent indicates they believe that the non-majors sell at a lower price than the majors.

The Witness: Generally, yes.

Hearing Examiner Piper: But there may be some difference of opinion as to how much, though.

The Witness: Generally.

Hearing Examiner Piper: Your definition of a non-major and counsel supporting the complaint keeps talking about an unbranded gasoline, but according to your [fol. 414] definition of a non-major, Standard Oil of Kentucky would be a non-major, and yet as I understand it, they are one of the big majors in my terminology, so this whole thing confuses me.

The Witness: Well, Mr. Examiner, Standard Oil of Kentucky is similar to Jersey Manufacturing. They have grown so large and are such a factor that they are considered as a major operator?

Hearing Examiner Piper: They sure are in the South.

They are one of the biggest sellers. They are Standard Oil and Standard Oil is a big seller everywhere.

The Witness: That is right, and in essence they have refinery connections because I understand they buy from other Standard companies.

Hearing Examiner Piper: Then there are certain non-majors that would be non-majors within your definition, but they are not any longer; they are majors.

The Witness: That is right.

Hearing Examiner Piper: That is not going to be very helpful.

The Witness: Well, I think——

[fol. 415] Hearing Examiner Piper: You see your own exhibits become confusing when you talk about prevailing non-major prices and prevailing major prices or majors within 1 cent of prevailing non-major prices. The question is which is which. Counsel talks about unbranded.

The Witness: Unbranded, which is to my mind just as confusing, because they have a brand name which they identify, which they use in advertising to try to get away from that confusion. In our company I have tried to get our sales organization to use a definition non-major. It is clearer to us because of using—I am sorry if it is confusing—we are trying to get away from the use of the word "independent" because all of our dealers are independent dealers.

Hearing Examiner Piper: The hearing will be in order. I might ask you one question, Mr. Wright, just to clarify the record for my own purposes:

Whenever counsel asked you a question in which he used the term "unbranded gasoline" or "unbranded stations", your answer assumed that it was a non-major station?

The Witness: That is right.

Hearing Examiner Piper: All right.

[fol. 416] By Mr. Wilson:

Q. Now, Mr. Wright, at page 497 of the record in response to a question of Mr. Henderson as follows:

"Would you please state specifically who were the sellers of gasoline competing for the business of the motoring public passing 19th and Pearl Streets," you answered:

"The Sun Oil Company through its independent dealer, Mr. McLean, and the Super Test station through its company-operated station."

Now, isn't it true that there are a number of other stations near 19th and Pearl with which your Sun Oil station was in competition?

A. I believe right at 19th and Pearl only those two stations, Super Test and McLean.

Q. Did you hear the testimony of Mr. Childs this morning, that there was a Red Arrow station adjacent to the Super Test station?

A. No, I wasn't here.

Q. That is correct, you were not here.

Isn't it true that within a two-block radius, Mr. Wright, there are ten or eight other gasoline service stations?

A. I don't know.

Q. Have you ever been in that area?

A. Yes, I have.

Q. Recently?

A. Oh, yes, within the last two years.

Mr. Henderson: We were down there last February, this year, Mr. Wright.

[fol. 417] The Witness: I didn't go out.

By Mr. Wilson:

Q. Do you recall seeing a Pure Oil station?

A. No; I recall seeing, I believe, a Sinclair and a Texas station. They were the two that registered.

Q. Do you recall what streets they were on?

A. No, I don't.

Q. Do you recall seeing a Shell station?

A. Yes, now I do; I believe there is a Shell station.

Q. Isn't there a Richfield station at 20th and Pearl?

A. I don't know.

Q. You did say you recall seeing a Sinclair station?

A. I believe it was Sinclair and Texas that I said I remembered seeing.

Q. And that is right in that area, is it not?

A. Within a number of blocks of that area on Pearl Street.

Q. And would you not say that those stations were within what you would consider the patterns of trade?

A. Yes, to a relative extent.

Q. You testified, Mr. Wright, motorists generally buy gasoline from a particular service station that is near them. Do you mean by that that if there are three or four stations in that area, that out of that three or four they will have one, or will be more favorable to one than to the others?

A. I said near their homes or their places of business.

Q. Have you found that to be true where there has been as much as 3 cents difference in price between that favorite station and the other stations?

[fol. 418] A. Yes. There is only a number of motorists who move because of price advantages in a so-called normal market.

Q. What you are saying then, actually, is that the public is not too much price conscious?

A. As the cut gets deeper, the price consciousness develops and more of the motorists will leave the station of their original choice to buy at a station offering the price advantage.

Q. Don't you think that 3 cents reduction is a substantial price advantage?

A. Three cents is a substantial price advantage.

Q. Yet you do not feel that that is enough to draw trade from the favorite station to another station?

A. I believe I said, and I meant to say that a definite number of motorists would move because of that price advantage, when you asked me that question.

Q. So this 4 per cent that Mr. Childs testified to from his survey—and again I am anticipating because you were not here.

A. I don't know what you mean by 4 per cent.

Q. Well, you were not here, and I will not ask you about that.

Isn't it true that of the small percentage that you say will shift—you do say that there is a small percentage that will shift?

A. There is a percentage that will shift, and that percentage increases as the price differential gets [illegible]

Q. You anticipated my next question.

Now, you made another statement that I would like further explanation of, Mr. Wright. You testified that the supplier maintains the principles under which gasoline is sold to the retailers. Just what do you mean by that?

[fol. 419] Mr. Henderson: The principles? What page are you referring to?

The Witness: Mr. Wilson—

Mr. Henderson: Wait a minute, Mr. Wright.

Where is this testimony taken from, Mr. Wilson? It is extraordinary to me, to maintain the principles. I do not recall any such testimony. What do you mean by principles?

Hearing Examiner Piper: I think maybe you misquoted it, Mr. Wilson. Nothing was said about principles. There was some testimony that they maintained the supply of gasoline, in other words, that the distributor or manufacturer is the source of the supply of gasoline rather than the filling station, because they have a limited capacity.

Mr. Wilson: I will rephrase my question. I do not have a record citation of that, and I thought I had jotted it down.

Mr. Henderson: I do not recall it.

Mr. Wilson: I will rephrase my question and ask this:

By Mr. Wilson:

Q. What are the obligations of the supplier in connection with the furnishing of gasoline to the retail public?

[fol. 420] Mr. Henderson: If Your Honor please, I must object to that question. That covers a whole multitude of everything. If there were any particular obligations they might be in the dealer's contract, but I do think it is a very, very broad question and I do not see how it can be answered.

Hearing Examiner Piper: I think possibly it could be. I think Mr. Wright is qualified as an expert.

I will overrule the objection, and you may answer if you know.

The Witness: Well, the first responsibility of a supplier with his dealer—and I suppose you are referring to the dealer, although you said the public. If it is the public, the first responsibility is we feel to make the best possible product available to the consuming public at the lowest possible price.

He asked me what is the responsibility, as I judge, sir, of the supplier to the public. You can go on and enlarge on that at considerable length. He has to make his product available through stations which are competitive in service, in appearance, and conveniently located so that the supplier can obtain his gasoline at locations either convenient to his home or to his place of business, or along principal arteries of travel——

Mr. Henderson: I dislike to interrupt you, but you said "so that the supplier can obtain."

[fol. 421] The Witness: Excuse me, sir, the motorist could obtain. I am trying to——

Hearing Examiner Piper: I think you have answered the question.

By Mr. Wilson:

Q. On page 493, Mr. Wright, you were asked this question:

"What are the leading characteristics of the motoring public's demand for gasoline," and among the reasons that you gave is that where the brand of gasoline that he usually buys is not available, then he would purchase that gasoline, another type or brand of gasoline from another station which he considered neat and attractive in appearance.

Now, isn't it true, and am I right in assuming from your answer to Mr. Henderson's question that the neatness and the well-kept appearance of the station has a lot to do with the demand of the public for the gasoline at that station?

A. Yes, and I was, particularly referring to a motorist traveling away from a station where he customarily buys his gasoline.

Q. Isn't it true that when a motorist is traveling along the road, that he is not very likely to be induced to go into a run-down, ill-kept looking service station?

A. I would think so.

Q. So if a station is neat and attractive, Mr. Wright, does not that alone have some bearing on the public patronizing that station, even though such station would perhaps be selling its gasoline at a little bit higher figure per gallon?

[fol. 422] A. A neat and attractive station is one of the reasons why people purchase products at that station.

Q. Now, isn't it the policy of the Sun Oil Company to have its stations maintained in as neat and trim a manner as possible?

A. We try to train our dealers so that they will keep their stations just as neat and attractive as it is possible.

Q. And aren't your salesmen working under your divisional managers instructed to observe the stations within their territory, even though they are independent dealer stations, as to the manner in which they are maintained?

A. What do you mean by "observe"? Naturally, as they go around they observe.

. . . . . .

Q. Isn't one of the duties of your salesmen, Mr. Wright, as they go through the territory, to observe the condition of the Sun Oil Company stations as to the manner in which they are kept up?

A. I answered that.

Q. Was your answer in the affirmative?

A. I said yes, it was their duty.

Q. And as a matter of fact, isn't that a factor that would necessarily be taken into consideration upon the question of whether or not you would renew a lease?

A. You mean the fact that they observed?

Q. No, the fact of how the dealer maintained that station.

[fol. 423] Mr. Henderson: If Your Honor please, I object to this form of question. I see no materiality. There is no question of anybody's lease being cancelled or anything whatsoever in this particular case.

Hearing Examiner Piper: I see it, though.

You do not take that into consideration?

The Witness: Oh, I haven't answered the question.

Hearing Examiner Piper: I thought you said no, it was not a practice.

The Witness: He asked me if the observation was a factor, and I said no.

Hearing Examiner Piper: He did not ask you that. He asked you if the manner in which the station was kept up was a factor.

The Witness: The general overall operation of the station would be a factor in determining whether a lease would be terminated or not.

By Mr. Wilson:

Q. Or renewed?

A. Or renewed.

Q. Now, Mr. Wright, you testified that you first learned of the situation at 19th and Pearl at a convention, was it not?

[fol.424] A. Regional managers' meeting.

Q. A meeting in Philadelphia?

A. Yes.

Q. On or about the middle of December, 1955?

A. Yes, somewhere around then.

Q. And that meeting was attended by Mr. Dietshe?

A. Yes.

Q. And he advised you of that situation at that time?

A. Yes.

Q. Was there anyone other than Mr. Dietshe from the Jacksonville area that was in attendance at that meeting?

A. No.

Q. Now at that time, did you arrive at a decision as to what you were going to do with respect to the situation at 19th and Pearl?

A. No.

Q. When did you make your decision to help Mr. McLean out in his competition with Super-Test?

A. It was either just before the Christmas holidays or on the day after the Christmas holidays.

Q. At that time did you not—did Mr. McLean write you

a letter, or write a letter to the Sun Oil Company, requesting assistance?

A. Mr. Wilson, I don't recall, and I don't recall having seen a letter from Mr. McLean.

Q. Do you not have a form letter, Mr. Wright, that you use when an independent dealer requests a competitive price allowance?

A. That would not be addressed to me. Yes, we have.

Q. You do have one?

A. We do have a form which is used.

[fol. 425] Q. I now show you Commission's Exhibit 26, which is a letter addressed to Sun Oil Company from Gilbert, McLean, and ask you whether or not that is the form letter of which I spoke and which you said yes, there was one?

A. Yes, it is.

Q. Do you require that in every case, Mr. Wright, where you give assistance to your dealers?

A. I believe so, and I think that is part of our policy.

Q. What is the purpose of that, Mr. Wright, if you know?

A. The purpose is that the dealer advises the district office either through some means of communication the price that he desires to post in order to meet his competition, and we then, taking into consideration the allowance that is going to be given the dealer in that particular situation, work out the margin or the reduction in the tank wagon price that is necessary to give him what we consider the margin that he needs to continue in business.

Q. How did you happenn to seize upon the figure of 1.7?

A. Because I understood from conversations with Mr. Dietshe that 1.7 was the voluntary allowance necessary to give this dealer a 3-1/2-cent margin.

Hearing Examiner Piper: A 3-1/2-cent margin of what?

The Witness: Between the price at which he advised the district he was going to sell the gasoline and the net tank wagon price after taking into consideration the voluntary allowance.

[fol. 426] By Mr. Wilson:

Q. Do you know what Mr. McLean's margin of profit was at that time?

A. I believe—no, I will have to answer that I don't.

because I don't know what price, or at that time I didn't know what price he was going to post, except Mr. Dietshe indicated that McLean advised him he would have to post such and such a price, and he would need a 1.7 voluntary allowance to give him 31.2 cents.

Q. Did Mr. Dietshe say that he had been advised, or that one of his salesmen had been advised?

A. Mr. Dietshe advised me. Mr. Dietshe didn't tell me whether he had been advised or whether his salesmen had been advised. If I said "advised", Mr. Dietshe merely informed me that that was the situation.

Q. Now, on page 183 of the record, Mr. Wright, Mr. Dietshe was asked this question:

"What was the margin of profit that Mr. McLean was operating under in the station at 19th and Pearl."

and after objection, et cetera, he said:

"I can't say specifically."

Now you say that you gave him 1.7 in order for him to operate at a margin of 3.5, and a little arithmetic would show that his margin of profit at that time, or prior to getting that, would have been minus 1.7, is that correct?

Mr. Henderson: Mr. Examiner, I object. It is nothing [fol. 427] but argument. I do not know the specific question that is asked. The testimony that was given by one man is not the testimony of this particular witness at all, and I object to the question.

Hearing Examiner Piper: Objection sustained.

Mr. Wilson: You did hear him say, if Your Honor please, that Mr. Dietshe told him that?

Hearing Examiner Piper: Yes, I heard him, but that is purely argumentative. The facts speak for themselves.

By Mr. Wilson:

Q. Now in the event Mr. McLean was going to sell his gasoline at 19th and Pearl, or rather was going to reduce the price from 28.9 to 25.9, which would be a reduction of 3 cents, would his margin of profit still have remained at 3.5?

Mr. Henderson: I object to that. There is no evidence here as to what his margin of profit was. That is assuming a fact which is not in the case.

Mr. Wilson: This witness just testified to that.

Hearing Examiner Piper: Objection overruled. You may answer.

The Witness: Will you kindly reask the question?

[fol. 428] By Mr. Wilson:

Q. Inasmuch as the testimony in this record is that Mr. McLean reduced his posted price of 28.9 to 25.9, which is a reduction of 3 cents, would he have received a margin of 3.5 cents per gallon after having done so?

A. It would be our policy that the dealer elected to post the price at which they post to meet competition, and we assure them of a 3½-cent minimum margin.

Q. Now, is that in addition to the rent he pays, Mr. Wright?

A. No, he pays the rent out of that.

Q. And if he is behind, shall we say if he had never posted the $2,000 with your company, isn't there an additional ½ cent per gallon taken off of that, in addition to the rent?

A. That varies with various dealers, depending upon the deal which is made by the dealer, with the dealer by the credit department. I don't know; I couldn't answer that it was standard practice.

Q. Do you know whether or not that was true in McLean's case?

A. I do not.

Q. Do you know why it happens, Mr. Wright, that Commission's Exhibit No. 26 is dated December 27, 1955, which is the same date that Mr. McLean received his temporary allowance?

A. I don't know the exhibit your are referring to.

Hearing Examiner Piper: The letter.

By Mr. Wilson:

Q. The form letter requesting assistance.

A. No, I don't know.

[fol. 429] Q. You do not know?

A. No.

Q. At the time you and Mr. Dietshe met at the regional managers' meeting on the 16, 17, 18 of December, 1935, as I understand your testimony Mr. Dietshe advised you that the granting of the allowance to Mr. McLean would be in accordance with the Sun Oil Company's policy, am I correct?

A. I am not sure that that occurred at that particular time, but when we discussed this matter Mr. Dietshe did so assure me. We had two discussions at that time, and also later on.

Q. Didn't you at that time ask Mr. Dietshe to return to Jacksonville and make a survey?

A. I did.

Q. What was the purpose of that survey?

A. I asked him to determine that the granting of a voluntary allowance to Mr. McLean would not have an adverse effect on the gallonage of our other dealers, and also to definitely determine that the Super-Test reduced prices which had gone on for some time had not had an adverse effect on the other dealers but was only affecting McLean.

Q. And what was his answer?

A. When he called me and asked me to authorize the voluntary allowance, he assured me that he had made such a check and had determined that there was no adverse effect on the other dealers in granting the voluntary allowance, and granting the voluntary allowance would not adversely affect them.

. . . . . .

Q. Now, on the occasion that Mr. Dietshe made this survey as to whether or not this Super-Test lower price was [fol. 430] affecting the other stations or not, and whether the voluntary allowance would have any effect on them, did he check into the prices that were being posted at the eight other stations in that pattern of trade area?

A. I can't answer that.

Q. You got your report, did you not?

A. No, I don't know, because I only got the report on the Super-Test station.

. . . . . .

Q. Mr. Wright, I was asking whether or not your response to the question was that you had observed that in the report from Mr. Dietshe.

A. I did not. You see, the report from Mr. Dietshe I did not receive a report from Mr. Dietshe, but he—

Q. He did report to you?

A. He reported to me, yes.

Q. How, sir?

A. By telephone.

Q. Was there any recording made of that telephone conversation?

A. No.

Q. Were there any stenographic notes made?

A. No.

Q. What was the sum and substance, as far as you can recall, of Mr. Dietshe's telephone conversation with you as to that situation?

A. Mr. Dietshe referred me to the conversations we had at the regional managers' meeting, and advised me that upon his return he had been informed by Mr. McLean that [fol. 431] due to the loss of gallonage that he was suffering, he would have to give up the station unless we would afford him some relief.

I asked him if he had made the checks that I requested at the regional managers' meeting. He advised me that he had, that the granting of this voluntary allowance would not adversely affect our other dealers and would tend to keep this independent dealer of ours in business and enable him to post a competitive price, if he so elected.

On getting that report I told Mr. Dietshe, go ahead and give the voluntary allowance. He told me it would be necessary to go to 1.7 in order to give our dealer the minimum margin which we at that time considered necessary to keep our dealers in business.

Hearing Examiner Piper: How close was that going to bring McLean's price to the price of Super-Test?

The Witness: I believe Mr. Dietshe told me that McLean said he was going to post within 1 cent of Super-Test.

By Mr. Wilson:

Q. But you do not know what the operating margin of Mr. McLean was at that time? You don't know whether he was operating under a 6-cent margin or a 7-cent or 8-cent, do you?

A. Prior to his——

Q. Receipt of the temporary allowance?

A. No.

Q. You do not know?

A. No.

Q. And yet you seized on 1.7 to give him 3.5?

[fol. 432] A. No, it didn't work that way. We had a rule at that time that the minimum margin we felt our dealers could exist on was 3½ cents, and when a dealer comes to us and says, "I elect to post a certain price to meet competition because I am being forced out of business," then we figure from his posted price, taking into consideration our tank wagon price, what the voluntary allowance must be, or would have to be to afford him that allowance or that margin of 3½ cents.

. . . . . .

Hearing Examiner Piper: Well, obviously, you are not to give your opinion of why Mr. McLean did something. I was thinking of you being an expert. Is there any significance to the 1-cent margin in the industry?

The Witness: Mr. Examiner, in our company there would be no particular significance because—and I would have paid no particular attention to the 1 cent because we have areas where 1 cent between the non-majors and ourselves exists, and areas where larger margins exist.

By Mr. Wilson:

Q. The purpose of your granting a 1.7 temporary allowance to Mr. McLean was to enable Mr. McLean to post within 1 cent of Super-Test?

A. Yes, if he so elected.

Q. Would he have been substantially better off competitively if he had not posted within 1 cent, Mr. Wright?

[fol. 433] Mr. Henderson: I object to that.

Mr. Wilson: Strike that question.

By Mr. Wilson:

Q. I believe you testified that Mr. Dietshe called you on the 27th day of December, is that correct?

A. I believe it was the 27th. It was either right before the holiday or the 27th.

Q. Christmas was on Sunday in 1955, was it not?

A. Yes.

Q. And Monday was a holiday?

A. Yes.

Q. Yet on this same day, that Mr. Dietshe called you, we have Commission's Exhibit 27 dated that same date requesting assistance. Do you know whether or not—of course you do not. Strike that.

Is it a practice of the Sun Oil Company, Mr. Wright, on the occasion of an opening of a new station, to lower the price to that station as an opening-day special, as was done by the Super-Test station at 19th and Pearl?

A. To lower our retail price? In the first place, the control of the price does not rest in our hands, unless it was a company-operated station, and we had very few of those.

The price that the dealer would elect to sell his gasoline is a matter of his own determination.

Q. From your own knowledge, Mr. Wright, is it the practice among your independent dealers to have an opening-day special in the form of a lower price?

A. No.

[fol. 434] Q. But yet you testified, did you not, that was one of the practices that Sun stations used to accelerate their advent into business?

A. I testified——

Mr. Henderson: I object to that. I think we are getting confused again between Mr. Childs and Mr. Wright.

Hearing Examiner Piper: Well, it is confusing.

Did you say that? I am not sure myself on this one whether you said it or Mr. Childs.

The Witness: Yes, as I recall.

Hearing Examiner Piper: You did?

The Witness: I said that under questions of price wars it was customary, I believe I used the word "customary", for a station in a chain of stations to reduce its price in order to gain——

Hearing Examiner Piper: Did you say in a price war?

The Witness: Did I say that? Let me start over again. I said that during—I was asked what caused price wars, and I said one of the causes of price wars was the fact that a chain of stations would reduce its prices to get [fol. 435] gallonage advantage, or a new station in that chain coming in would reduce its price in order to get itself off to a good start. I was primarily referring to stations of non-majors who had used that practice throughout the industry and is well known.

Hearing Examiner Piper: The Majors do not?

The Witness: The majors generally do not.

By Mr. Wilson:

Q. In your opinion, based on your long experience in this industry, Mr. Wright, why do you believe that practice to be followed by the non-majors as compared to the majors?

A. I believe because they have found from experience that it is a good way to build a large gallonage in a short period of time.

Q. Now this Super-Test station at 19th and Pearl Streets in Jacksonville was not built, was it, until August 1955?

A. I believe that is the date.

Q. It had been in operation only a few months prior to December, had it not?

A. That would be correct.

Q. Now do you know as to what it looks like compared to your Sunoco Station at 19th and Pearl? Does it compare favorably?

A. I believe I testified that I did not go out and see the station when I was down there, so I am not in position to answer.

Q. You did not observe, then, or ask Mr. Dietshe to observe whether or not a refurbishing, so to speak of the station of 19th and Pearl rather than a temporary allow- [fol. 436] ance in fact would be the answer to the competition of Super-Test across the street?

A. I did not ask that question.

Redirect examination.

By Mr. Henderson:

Q. The first is, I would like to ask you, Mr. Wright, there has been quite a little testimony here concerning octane values or ratings or whatever it may be. Now as of the time of the advertisements of the Super-Test in the fall of 1955, what was the octane rating of value of Sun, Sunoco?

A. Blue Sunoco?

Q. Yes.

A. 92.5.

Q. And can you tell His Honor whether or not your Blue Sunoco had a standard equivalent of the premium gasolines?

A. Yes, sir. The standards used in the industry are those established by the Ethyl Corporation, the du Pont Corporation, the maker of tetraethyl lead and the General Motors Research Laboratory. On that basis, our gasoline is a premium gasoline meeting all of their premium specifications.

Q. Mr. Wright, when Mr. McLean lost gallonage, it of course follows naturally that Sun lost gallonage, does it not?

A. It does, yes, sir.

Q. Now, in this advertisement which has been marked Respondent's Exhibit 10, which has been received as Respondent's Exhibit No. 10, it speaks on here of the special price of Super-Test Regular First Grade, with 87 1/2 octane [fol. 437] gas, but at the bottom it says "Free." They are giving something free. They are giving trading stamps and I understand the ladies are pretty much interested in trading stamps and I guess others are, too. What is the effect of that with reference to price?

. . . . . .

A. Yes, sir, savings stamps have a very definite effect on the gasoline, on the sales of the service station offering the stamps varies, but we evaluate them at about a cent a gallon.

. . . . . .

Q. And in addition to trim and neat stations and the price, there is an added incentive from a competitive point of view where a station offers premiums such as trading stamps?

A. That is right.

Q. That is a competitive factor that is taken into consideration?

A. That is a competitive factor.

Q. And even though a station could be selling an inferior gasoline to that of Blue Sunoco, the additional premium of savings stamps would tend to divert customers from Sunoco to that station?

A. There is a definite advantage to having trading stamps at a station, offering trading stamps, providing the other stations do not offer them.

Q. Do you know whether or not, Mr. Wright, that the station, the Super-Test station at 19th and Pearl, was giving trading stamps as of January and February, 1956?

A. No, I don't.

. . . . . .

[fol. 438] Mr. Henderson: Mr. Wright, as far as your 19th and Pearl station, it gave no trading stamps then?

The Witness: Mr. Henderson, I do not know.

Mr. Henderson: All right.

Hearing Examiner Piper: I take it, Mr. Wright, that you said—I think either you said or the record shows that the price Mr. McLean was charging was 28.9 before he reduced his price after you gave him the allowance?

The Witness: The record may show that. I didn't say that.

Hearing Examiner Piper: But you did say before that he was going—that if he elected to do so, the allowance would permit him to post a price within 1 cent of the Super-Test price?

The Witness: Yes.

Hearing Examiner Piper: And that would have been 3 cents less than he had been selling it for?

The Witness: That is right, if he had posted 28.9.

[fol. 439] Hearing Examiner Piper: Well, anyway, the price that he would post thereafter then was 25.9?

The Witness: That is the price I was told he elected to post.

Hearing Examiner Piper: All right. Then I take it that the Super-Test price at the time this particular allowance was granted was something different than shows in this exhibit. It must have been 24.9?

The Witness: I would say it was 24.9.

Hearing Examiner Piper: But in August of 1955, according to Respondent's Exhibit 1, is was 21.9?

The Witness: That is right.

Hearing Examiner Piper: And nothing was done then or until December?

The Witness: I believe that was a short time special.

Hearing Examiner Piper: And then apparently afterwards, in January and February, which was after the time you granted him this allowance, Super-Test's price was lower than it was when he came down 3 cents, because all of these exhibits show 23.9.

[fol. 440] The Witness: I believe, from hearing the testimony, that he moved down either that day or the day after, to 23.9; by "he," I mean Super-test.

Hearing Examiner Piper: And no further allowance was given by Sun Oil to McLean Oil?

The Witness: No, sir.

Hearing Examiner Piper: And I think you testified that you made the decision as to allowing him 1.7?

The Witness: Yes, sir.

Hearing Examiner Piper: You yourself?

The Witness: I made it.

Hearing Examiner Piper: And transmitted it to the Jacksonville area, to Mr. Dietshe?

The Witness: Right; that is right.

Hearing Examiner Piper: Supposing McLean had decided to post the same price as his competition across the street, what allowance would you have granted him then?

[fol. 441] The Witness: Our policy was to give our dealers 3½ cents a gallon.

Hearing Examiner Piper: That is what I understood you to say.

The Witness: If Mr. McLean had felt that he had to post within or meet his competition, as we say in the industry, on the nose, he would then have gotten a 2.7.

Hearing Examiner Piper: He would have?

The Witness: Yes.

Hearing Examiner Piper: You would have given it to him?

The Witness: Yes, sir.

Hearing Examiner Piper: Then when they went down to 23.9 he didn't ask for anything further?

The Witness: We had no request that reached my office. I had no request that he asked for an additional allowance.

Hearing Examiner Piper: Do you want me to understand that any dealer can decide to meet competition, no matter what it may be, a competitive price, and that once [fol. 442] he makes that decision you will give him enough of an allowance so that he can do it and still make 3½ cents a gallon, no matter what the amounts involved is?

The Witness: That would be the result of our policy.

Hearing Examiner Piper: And you would not turn him down?

The Witness: We might counsel with him and suggest that it was not necessary for him to go down there to meet that lower price and suggest that he try a higher price, but if he elected to go to the lower price we would give him 3½ cents.

Hearing Examiner Piper: Under certain conditions that might result in your selling him gasoline at a loss?

The Witness: Possibly for a time.

Hearing Examiner Piper: But still you would give him the allowance?

The Witness: Yes, sir.

Hearing Examiner Piper: That is all the questions I have. Either party may examine.

[fol. 443] Mr. Henderson: Mr. Wright, did you personally or your company have anything to do with the retail price of selling this gasoline as fixed by Mr. McLean?

The Witness: I did not have anything to do and I do not believe that my company had anything to do with the retail price that was fixed by Mr. McLean.

Mr. Henderson: As far as you were concerned, you had nothing to do with it?

The Witness: I had nothing to do with it.

Mr. Henderson: He has testified that that was something he fixed himself.

The Witness: You are right.

Mr. Henderson: You heard that when you were in Jacksonville?

The Witness: That's right.

Mr. Henderson: That is all.

[fol. 444] Mr. Wilson: Mr. Wright, what would happen if Mr. Perry had posted a price at his station at 10th and Main in Jacksonville 2 cents under the prevailing price posted by your other Sunoco dealers in Jacksonville?

The Witness: What would have happened?

Mr. Wilson: What steps would the company have taken?

The Witness: None.

Mr. Wilson: You wouldn't permit that?

The Witness: We have no control over the price our dealers post.

Hearing Examiner Piper: That seems like a peculiar situation, if you have no control over the price the dealers post, and you have said it repeatedly, and yet you have a policy under which you in effect guarantee them a 3½ cent margin to operate on. Then they could pick out an artificially low price and because of your policy you have to follow them down and give them an allowance so that they would still have a 3½ cent margin of profit. That does not make sense.

The Witness: Mr. Piper, if I gave that impression then I was incorrect. If they pick out an artificially low price we [fol. 445] wouldn't recognize such a price and we would not put our policy into effect, but if it is what we consider legitimate actual competition, then we would put our dealers in position to meet that competition if they elected to do so.

BEFORE THE FEDERAL TRADE COMMISSION

Courtroom No. 2
U. S. Court House,
Philadelphia, Pennsylvania

Wednesday, May 15, 1957.

Met pursuant to adjournment, at 10:00 o'clock a. m.

BEFORE: Robert L. Piper, Hearing Examiner.

APPEARANCES:

Rufus E. Wilson and Ross D. Young, Attorneys for the Federal Trade Commission.

Joseph W. Henderson, 1910 Packard Building, Philadelphia, Pennsylvania.

Leonard J. Emmerglick, 1826 Jefferson Place, N. W., Washington, D. C.

J. Blair Moffett, 1608 Walnut Street, Philadelphia, Pennsylvania; and Henry A. Frye, 1608 Walnut Street, Philadelphia, Pennsylvania, Attorneys for the Respondent.

. . . . . .

[fol. 446] COLLOQUY BETWEEN HEARING EXAMINER AND COUNSEL

Mr. Henderson: May I first ask to make a correction, Mr. Examiner, which I pointed out to Mr. Wilson. This appears on page 622 of the notes of testimony. In answer at the fourth line from the bottom of that page the fourth word is "we." That is incorrect. The word should be "he," so the line would read—line 22 in this transcript I have—"a price, and he would need a 1.7 voluntary allowance to give him 3½ cents."

I pointed that out to Mr. Wilson and that is the correction we would like to make, sir.

Hearing Examiner Piper: Motion granted.

Mr. Henderson: Now, Mr. Examiner, there were certain pages of Respondent's Exhibit 9, being the du Pont survey, which Mr. Childs referred to in his testimony. In order that we may not have to reproduce the entire book, the

pages that he was referring to in this report were the second page, or perhaps the first real page, and pages 9, 52 and 53. Those are the pages that he referred to in connection with his testimony, and therefore, if we have to reproduce this for the record, we wish it limited to those particular pages, because that is what he has referred to in his testimony.

Hearing Examiner Piper: Are you referring to a possible record on appeal, because the book was received as an exhibit.

[fol. 447] Mr. Henderson: The book was offered as an exhibit, referring to various pages of it.

Hearing Examiner Piper: Yes, I understand that.

Mr. Henderson: So whatever formal record we have to file with you, or——

Hearing Examiner Piper: The exhibits are a part of the record, so as it stands now it is in the record, the whole book, with specific reference to those pages.

Mr. Henderson: With specific reference to those particular pages. What we would like to do is be in position to furnish a photostatic copy of those pages which he referred to rather than just the entire book.

Hearing Examiner Piper: You want to withdraw the exhibit?

Mr. Henderson: To withdraw the exhibit and furnish to you, Mr. Examiner, and counsel a photostatic copy of the pages referred to, so we are not burdened with the entire book.

Mr. Wilson: Mr. Henderson asked me about that earlier this morning. I have not had occasion to examine this book, and I advised Mr. Henderson that I thought that [fol. 448] would be all right. Now, subsequently I have examined the book and it is true that what Mr. Childs testified to is mainly concerned with pages 52 and 53, and with the exception of an introductory statement on page 2 of the report, but I feel that this is more or less an emasculation or rather this proposal is more or less an emasculation or dismemberment of the entire du Pont report, and therefore in order to have a well defined and well rounded picture, I now feel that the entire exhibit should remain in the record.

Mr. Henderson: Mr. Examiner, this document has to do with many things, tires, batteries and all kinds of things entirely foreign to this case. We were trying to limit it to the issues, and Mr. Childs would say exactly what pages he was referring to in connection with it, and when our friends asked yesterday the basis of the survey or what he depended upon, this was produced, but you will recall he himself referred to particular pages and we would like to limit the record.

Hearing Examiner Piper: As a matter of fact, our rules cover that. Rule 314 provides—which is the rule of evidence—that irrelevant or inadmissible parts of documents be segregated and excluded so far as practical. That is what our own rule provides and what you are proposing with respect to the document in front of me now, is apparently the difficulty that Mr. Wilson feels in addition to the pages specifically referred to by the witness and himself this morning, there are other pages which may cast [fol. 449] some light upon his testimony or his interpretation of the survey. I take it that is what bothers him.

Mr. Henderson: Why, then, Mr. Examiner, if Mr. Wilson wants to offer that that may then be part of his case, but as far as Mr. Childs is concerned, he has stated the pages that he was referring to and the rest of it does come within your rule. For instance, here is page 78, "Question: How long ago did you yourself buy tires, batteries, oil filters?" That has nothing in the world to do with what we are talking about. There is a lot of talk about batteries, tires, filters and all kinds of supplies.

Hearing Examiner Piper: May I see it?

Mr. Henderson: Certainly, sir (handing document to the Examiner).

The pages are this (indicating) on the first page, then pages 9, 52 and 53. Those are the ones that Mr. Childs referred to.

Hearing Examiner Piper: Do you have anything specific that you have in mind, Mr. Wilson?

Mr. Wilson: Yes, sir. I might as well be frank about it, if Your Honor please. I am going to use this exhibit for whatever it may be worth, regardless of the reasons that it was put into evidence by respondent. I refer specifically to page 19, "Brand name recognition and loyalty to brand."

[fol. 450] Page 35, Knowledge of gasoline grades." Page 41, "Price is the main consideration in the selection of regular." Those are among several of my reasons for asking that the entire exhibit remain in the record, and in the vernacular, they are stuck with it. They introduced it in the record.

* * * * * * *

Mr. Henderson: I would make this suggestion, which I trust will be helpful, Mr. Examiner, that at least the report be limited to gasoline. It covers a lot of things. I do not think we will have any difficulty on that.

Hearing Examiner Piper: No. I am sure you are both interested in it only from the point of view of what light it will cast on this case, and that is all I am interested in. Any survey about tires and batteries and things like that—in other words, anything in it which is not relevant to the issues in this case, I would ignore anyway. But I am trying to assist the record in limiting it to those things which are relevant as much as possible. I do not think we know right now.

Mr. Henderson: Well, Your Honor please, our position is in the first place, as we are interested in gasoline, as far as that is concerned, we have referred to Your Honor the pages which we have referred to in our testimony in connection with the document. I do not think we need to belabor it or burden you further. I have made our position clear to Your Honor. As I say, there may be other things in it that Mr. Wilson wants, and I guess that is one of the things that [fol. 451] we will cross at this time. I think we have made our position clear to Your Honor.

Hearing Examiner Piper: Yes, you have. I will leave the exhibit in as it is and rely upon counsel to advise me you have already advised me which portions you rely upon.

I do not know how familiar you are with practice, Mr. Henderson, but in filing the proposed findings by counsel they are supposed to refer to the record in support of any proposal they make, and with respect to exhibits, this specific exhibit, and if it is a voluminous exhibit like this, a specific page number.

Mr. Henderson: All right. We will try to comply.

Hearing Examiner Piper: You have already done that on the record.

. . . . . .

EDWARD H. BEARDSLEY, JR., was called as a witness for the respondent and, having been previously duly sworn, testified as follows:

Direct examination.

Mr. Henderson:

Mr. Examiner, may I state that I consider this in the nature of corrections of the testimony, the same as we did before, but I will ask the questions.

[fol. 452] By Mr. Henderson:

Q. Mr. Beardsley, I am referring specifically to page 389 of the testimony which you gave in Jacksonville in this case previously, and there was a question asked of you on page 389, which was asked by the Examiner, and so that you may have the whole matter before you, starting on line 11:

"Hearing Examiner Piper: But you still have not—" I think the "a" ought to come out——

"answered my question."

If you don't mind, let's correct that.

"Why was the decision reached to grant an allowance to Mr. McLean which would permit him to retain a gross profit of 3.5 cents a gallon if he posted his price at 25.9 when in so doing it would bring him within 1 cent of his competitor across the street, if prior thereto and subsequent thereto, 2 cents was considered a competitive margin?"

That was the question that was asked. Now, here was the answer:

"The Witness: The only thing I can say on that in my experience from sub-normal price situations and Mr. McLean had been aware of these facts; I am sure that in a sub-

normal market the pattern had been for the majors to post prices which would have been within 1 cent of independents."

[fol. 453] Now what I am asking you, what did you mean by "majors"?

A. I mean those dealers handling the brands of the major oil companies, independent lease dealers.

Q. Now, 393——

Mr. Wilson: I did not get that answer.

The Witness: Those dealers who handle the brands of the various major oil companies rather than the companies themselves.

Mr. Wilson: Mr. Henderson, what you are attempting to do is substitute "independent dealers"?

Mr. Henderson: I am trying to put in what he intended when he said the majors. Actually what he meant was dealers. That is what he meant.

Mr. Wilson: I would stipulate that.

Mr. Henderson: The same thing on page 393. Perhaps we can do it that way and stipulate it, Mr. Wilson. Perhaps we can save some time.

On line 11 the witness says:

"The major postings, I think, are generally within a cent."

[fol. 454] I am perfectly willing to ask him what he meant by the majors.

Hearing Examiner Piper: The same thing?

The Witness: Again those dealers handling the major brands.

Mr. Wilson: It will be stipulated.

Hearing Examiner Piper: Stipulation accepted.

By Mr. Henderson:

Q. In other words, you mean the dealers handling major brands?

A. That is correct.

Mr. Henderson: Now the question on line 10, page 395:

"Isn't it true that your 1 percent differential that you tried to maintain, as was attempted to be maintained in

this instance here, was because this was an independent competitor rather than one of the majors?"

And the witness said:

"Repeat that, please."

[fol. 455] By Mr. Henderson:

Q. Now, what did it mean to you that one cent price differential that you tried to maintain? What have you to say about that?

A. Well, as was attempted, as Mr. McLean attempted to maintain, not "you" in terms of the company. Our only participation was at the tank wagon level.

Q. This is a question that was asked you, Mr. Beardsley.

A. Yes, sir.

Q. I will just read the rest of it:

"Answer: Repeat that, please.

"The reporter read the question as follows:

"Question: Isn't it true that your one cent differential that you tried to maintain, as was attempted to be maintained in this instance here, was because this was an independent competitor rather than one of the majors?")

"Hearing Examiner Piper: He means one cent.

"Mr. Henderson: One cent.

"The Witness: One cent, I understand that. I guess the answer to that must be yes."

What do you mean by that?

[fol. 456] A. I mean the "yes" after the "one cent," but as far as our maintaining the price, that was not intended. Mr. McLean may set the price.

Mr. Wilson: Your Honor, I object to the witness answering the question and ask that the answer be stricken. It is an attempt now to conform this record at a later date when they have had opportunity for reflection, perhaps, as to the evidentiary value of such statement. He was asked that question specifically and purposely, and that is the answer that I wanted and that is the answer that I got, and it is too late now to ask this witness what he meant, what he means now, after months of reflection on the answer

that he gave at that time. We would never have any law suits if witnesses were permitted to do that.

Mr. Henderson: Your Honor please, in the first place I do not agree with my friend's conclusion of law. He was called as a Government witness and he was put on the stand and we have a perfect right to ask what he meant.

Mr. Wilson: Let's get this Government witness straight. Mr. Beardsley, in all respects, is an adverse witness.

Mr. Henderson: Well, he was called by the Government.

Mr. Wilson: He was called by the Government, yes, but he was a hostile witness.

[fol. 457] Hearing Examiner Piper: Did you cross-examine at that time?

Mr. Henderson: No, we did not. We asked him no questions at all there, because this hearing was going to be held later on; and it was the last day of the hearing in Jacksonville, and this question in the first place has ambiguities in it, and it has assumptions in it.

"Isn't it true that your one percent differential that you tried to maintain——"

There was no evidence here that he tried to maintain it——

"——as was attempted to be maintained in this instance here."

Hearing Examiner Piper: Who asked this?

Mr. Henderson: This is Mr. Wilson.

Hearing Examiner Piper: I will let it stand. I am perfectly able to draw my own inferences. If the witness is changing his testimony in material respects rather than explaining ambiguities I will be able to see that. If he is explaining an ambiguity, I will be able to see that. Now, what he said then stays in the record. What he says now stays in the record. The point you were making would really go to the weight of what he was saying now. If he is trying to explain something, I realize that the terminology which the respondent seeks to avoid, as is evidenced [fol. 458] quite frequently, you do not want at any point to refer to the price of a gasoline at the retail level as their price. They do not operate the filling stations, the dealers do that, and that is the point that you have reiterated, but

in ordinary terminology you speak of it as a Shell station or a Sun station, and there is a distinction made; I see that.

. . . . . .

Arnold Childs, resumed the witness stand and was examined and testified further as follows:

Mr. Henderson: Mr. Wilson, you may cross-examine.

Cross-examination.

. . . . . .

Colloquy Between Hearing Examiner and Counsel

Mr. Emmerglick: Our only purpose in offering this was to indicate that there are times when a differential of one cent existed between the majors, including Sun, and the non-majors, such as Super-Test, Merit and so on. We gave McLean price assistance to enable him to post a price which he selected, which was at the time he selected it, one cent above the Super-Test price. We think we acted in good faith.

. . . . . .

Hearing Examiner Piper: As I understand you then the only purpose of whatever proof respondent has offered along this line, the line of showing that at least some of the time there is a one-cent differential between the majors and [fol. 459] the non-majors is to demonstrate that when they made their allowance to McLean it was good faith as far as the one-cent differential was concerned.

Mr. Emmerglick: Precisely, and this is coupled with evidence already in the record that there was in Jacksonville a one-cent differential earlier in 1955. This evidence is already in the record. Now, the whole thing——

Hearing Examiner Piper: That all ties in with the defense under 2(b)?

Mr. Emmerglick: Yes. Now, the whole thing is de minimis, really, for two other reasons, and for this reason

I am trying to see if we can not eliminate a great deal of this unnecessary development of this in the record. Within 48 hours after the price assistance was given to McLean, the Super-Test station dropped further, so that there was a two-cent differential. The one-cent differential was not maintained for anything more than from 24 to 48 hours. More than that, the Super-Test advertisement with their trading stamps, which Mr. Wright said were worth about a cent a gallon, brought it about that really where you give reflection and credit to that, there was a two-cent differential from the beginning, so that all that we want to do is to show that when we gave McLean price assistance to enable him to do what he wanted to do, post a one-cent a gallon price, money price, above the posted price of the Super-Test station, we were acting in good faith in that we had had knowledge and experience in the past broadly [fol. 460] throughout the area from time to time with one-cent differentials.

This is the whole purpose of it. We do not wish to claim, as Mr. Wilson suggests, that there is some reason for concluding from this that there was an ability on the part of the non-majors to compete. We have no such purpose in offering this evidence. We are quite willing to limit it to the purpose that I have indicated, that would be relevant only to the issue of good faith.

Mr. Wilson: Limit to the fact that a non-major without the use of premiums and savings stamps and so forth could not compete?

Mr. Emmerglick: This is another point. I do not see why we should stipulate as to another point. We are saying in offering this only that it is relevant only to the issue of good faith.

Hearing Examiner Piper: It seems to me—I may be mistaken—but it seems to me, as I understand Mr. Emmerglick's position, I think he is absolutely right, and I think that we will be wasting time to go into this, so to speak, collateral issue which it really is. It is not a major issue in the case. It is merely an issue or a point which they have raised in defense as an attempt to establish as a collateral point that the one-cent margin did not have any ulterior significance, so to speak. I think what is confusing counsel in support of the complaint and I know it is con-

fusing me or starting to confuse me, is I do not believe in [fol. 461] this case we have any issue about what is the normal competitive market as you do in the Pure Oil case. I think the two cases are starting to overlap in our minds.

Mr. Wilson: No, if Your Honor please, I am not confused.

Hearing Examiner Piper: Well, what in this case do we have any concern with the normal margin of competition between majors and non-majors?

Mr. Wilson: I will be very glad to explain that to the best of my ability.

Hearing Examiner Piper: We have 2(a), price discrimination, and we have alleged price fixing under Section 5. Those are the only two issues?

Mr. Wilson: That is true. Now, we are trying to meet a defense. I anticipated such a defense would be raised and such position would be taken as part of the defense. It is a well known fact in the marketing of gasoline that from time to time the major oil companies resort to what is known as the Chicago Plan, to whip an independent into line.

Hearing Examiner Piper: What?

[fol. 462] Mr. Wilson: To whip an independent into line and they do that by posting a price one cent over that of the non-major, to use their words, knowing that he can not compete at that one-cent differential. And Mr. Wright took the stand yesterday and testified as to why they have to have these things in order to compete now. So here we have a Super-Test station selling nonbranded—it is a non-major—in competition with Blue Sunoco. McLean wanted to post a price one cent over that of Super-Test. Why? Because it is traditional in the industry that that independent could not compete. So therefore this is relevant and we are not going on a fishing expedition.

Hearing Examiner Piper: You mean McLean knows about the traditions of the industry?

Mr. Wilson: If McLean did not know he was told.

Mr. Emmerglick: There is no evidence of that.

Mr. Wilson: There is evidence, because your own witnesses testified that he wanted to post a price within one cent. McLean said he did.

Hearing Examiner Piper: All right. Assuming everything you say is correct—but I do not formally assume that—but assuming for the sake of argument, what has that got

to do with this case? I still do not see it. Let's assume [fol. 463] that you can prove or could prove that the normal margin necessary for the independents to compete was two cents or more, and that they cut the price to within one cent, which would compel Super-Test to take some action or the Super-Test dealer. What has that to do with this case?

Mr. Wilson: It shows a predatory pricing practice.

Hearing Examiner Piper: That is actually what you alleged in Pure Oil and did not allege in this case.

Mr. Wilson: I don't have to allege it here.

Hearing Examiner Piper: That is what I am talking about. You are confusing the two cases.

Mr. Wilson: I am not confusing them. I have a Count II case here. I cited to you the other day——

Hearing Examiner Piper: Price fixing you have.

Mr. Wilson: Price fixing. I have Count II, which is price fixing. I cited to you the other day the Chicago Board of Trade case. If Pure Oil Company launches out on a predatory pricing practice that is something that is relevant under the Supreme Court's ruling in the Chicago Board of [fol. 464] Trade case. You must take that into account. Why did they do that? Because they wanted to eliminate or hurt a competitor selling unbranded gasoline. It is a weapon that they use.

Hearing Examiner Piper: The words sound good, but what do they mean? What do you mean by a predatory pricing policy, price cutting?

Mr. Wilson: I think it is a plan or a policy to eliminate or to injure or harrass or to hurt in some way a competitor.

Hearing Examiner Piper: In what way?

Mr. Wilson: They can do it in several ways. In this instance they did it by enabling McLean to post a price within one cent of the competitive station.

Hearing Examiner Piper: Which was what regarding price?

Mr. Wilson: It resulted in violation of two statutes, we charge. The Robinson-Patman Act——

Hearing Examiner Piper: Forget about Section 2 now. What kind of price misconduct was that under Section 5?

[fol. 465] Mr. Wilson: Putting in McLean's hands—by

inducing McLean to post a price of one cent over that of the price posted by the Super-Test station with the intent and design and with the knowledge of knowing that the station across the street could not compete if McLean's station stayed within one cent, and the evidence is in this record how McLean's sales jumped up.

Hearing Examiner Piper: That is a predatory price cutting allegation and there is no such allegation in this complaint.

Mr. Wilson: I say, if Your Honor please, it does not have to be pleaded.

Hearing Examiner Piper: Of course it has to be pleaded. All the issues that are before me are those that are pleaded and no others.

Mr. Wilson: If Your Honor please, anything bearing on motive, intent and purpose in a price fixing case is relevant and I cite to you again the Chicago Board of Trade case.

Mr. Emmerglick: May I make one observation?

Hearing Examiner Piper: Price fixing and price cutting with the intent to drive competition out of business is what you are talking about and they are two entirely different things.

[fol. 466] Mr. Wilson: And they are used as a weapon, if Your Honor please.

Hearing Examiner Piper: But you say nothing in the complaint about fixing a price or cutting the price to within one cent of the competition in order to drive them out of business, but you did in the Pure Oil case.

Mr. Wilson: I respectfully submit that I did not have to.

Hearing Examiner Piper: Then why did you say it in the Pure Oil case if you do not have to? That is why I say I am still——

Mr. Wilson: Perhaps I had a different reason.

Hearing Examiner Piper: —under the impression that the two cases are overlapping in your mind and I do not think the one-cent differential has anything to do with this case. Furthermore, as Mr. Emmerglick pointed out, the next day Super-Test went down another cent, so they were back to their normal competitive difference.

Mr. Wilson: All right. So what? McLean went down again.

Mr. Emmerglick: He did not.

[fol. 467] Hearing Examiner Piper: The record shows that he did not.

Mr. Wilson: Didn't McLean make a drop?

Mr. Emmerglick: He did not.

Hearing Examiner Piper: On your theory, anyone who cuts a price to compete is violating the law and we would have uniformity of price throughout the country, which is exactly what we do not want.

Mr. Wilson: That is not my theory.

Hearing Examiner Piper: If a man cuts the price down to within a margin where his competitor says, "Well, he's going to get all the business, so I better reduce my price," that is exactly what we want. We want price competition in order to protect the public in economy, otherwise the prices would be all artificially set. If he sets that price with the intent to injure, yes, you have a violation of Section 3 of the Robinson Patman Act, which has nothing to do with what we are talking about now.

Mr. Wilson: It doesn't matter, if Your Honor please, here —

Hearing Examiner Piper: It could and would be a violation of Section 5, but you have not pleaded that.

[fol. 468] Mr. Wilson: But under Section 5 we do not have to plead in so many words.

Hearing Examiner Piper: You have to put the matter in issue, otherwise you will be depriving the respondent of due process.

Mr. Wilson: The matter is in issue.

Hearing Examiner Piper: You can not come in Court and say, "We charge them with price fixing," and then come into Court and prove discriminatory price cutting in violation of the Robinson-Patman Act, Section 3.

Mr. Wilson: I certainly can.

Hearing Examiner Piper: No, you can not.

Mr. Wilson: Well, I may not with you, but I have drawn quite a number of complaints and I think I know what is relevant and anything that is relevant I can plead.

* * * * * * *

Hearing Examiner Piper: Why in these areas do you pick out a portion of a place?

[fol. 469] The Witness: We have a trouble spot and we use that as the focal point, and we take the area around

there, going as far as we feel necessary to cover the inference that may develop.

Hearing Examiner Piper: The trouble spot normally begin a non-major station?

The Witness: In these cases, yes, sir.

. . . . . .

Q. I call your attention to Respondent's Exhibit No. 8.

Mr. Henderson: Are you through with Exhibit 7 now, Mr. Young?

Mr. Young: Yes, sir.

By Mr. Young:

Q. Do the areas listed thereon include all of the areas in the State of Florida in which you have conducted this price survey?

A. No, sir. You say "you have conducted".

Q. Under your supervision.

A. These surveys are not always under my exact supervision. We have laid out the procedures, but in the course of normal routine studies our districts and regions conduct price surveys whenever they feel such surveys are necessary.

[fol. 470] Q. This survey was conducted by the regional office in the State of Florida, is that correct, and not under your direct supervision?

A. Not under my direct supervision, that is right.

Q. Do you happen to know whether or not there were other areas covering the same period in 1953 to '55?

A. I am sure there were other surveys.

Q. Do you have access to that information?

A. I could get such information.

Q. I call your attention to the first area in Miami. Do you think you can find that?

A. This was a portion of Miami covering in the neighborhood of 200 stations.

Q. Does the prevailing price of 22.9 indicate to you a depressed price?

A. I would think that would be somewhat depressed.

Q. How many cents?

A. That is 1953, and my memory doesn't tell me what

we would have considered a normal market back four years ago.

Q. But you would say it was obviously a depressed price based on the other figures on the exhibit. It would appear to be a price war?

A. It would appear to be yes, sir.

Q. Can you give me the number of non-majors covered by that survey?

A. Yes, 21.

Q. The number of majors?

A. The number of majors, 194.

Q. The number of Sun dealers?

A. 23.

[fol. 471] Q. I call your attention to the area designated as Lakeland, Florida. Is that a very large city, do you know offhand?

A. No, that is not a large city. That is small.

Q. Would you define that area?

A. This would take stations in the main part of the town of Lakeland.

Q. Does that price of 27.9 indicate a price war, or would you think it would be approximately a normal price?

A. I would think that approached normality.

Q. How many non-majors did you cover in this Lakeland area?

A. 4.

Q. How many majors?

A. 41.

Q. How many Sun dealers?

A. 5

Q. I call your attention to the area designated Plant City. Will you define that area?

A. That would be the stations in the main area of Plant City, along the arterial routes.

Q. Can you tell me approximately how large Plant City is?

A. I have been there a number of times. I know it doesn't take long to drive through. It has a relatively small town shopping area and residential areas surrounding it.

Q. Could you estimate the population?

A. I wouldn't attempt to do that. I am not familiar enough with the outskirts.

Q. How about the price, 28.9. Does that indicate anything to you?

A. That would appear to be a relatively normal figure.

[fol. 472] Q. How many non-majors are there in this area?

A. 4.

Q. Majors?

A. 30.

Q. How many Sun?

A. We only have one station there.

Q. One Sun station?

A. Yes.

Q. I call your attention to Bradenton. Will you define the area?

A. This survey covers the stations in the major portion of Bradenton.

Q. Is that a small town?

A. I am not familiar with Bradenton.

Q. Does the price 27.9 indicate a normal price?

A. It would appear to be.

Q. How many non-majors did you include in this survey?

A. 10.

Q. How many majors?

A. 38.

Q. How many Sun dealers?

A. 4.

Q. I call your attention to the area of Jacksonville. Will you define for us what part of Jacksonville you included in this area?

A. You are talking about the January 25, 1955 study?

Q. That is correct.

A. This Jacksonville study plots the main competitive arteries from a service station base in Jacksonville.

Q. Would that be the same arteries as marked on your Respondent's Exhibit 5?

[fol. 473] A. Largely, I would say. The study goes down into this corner a bit (indicating), but largely the same area.

Q. Does the price 28.9 appear to be a normal price?

A. I would judge so.

Q. Would you give me the number of non-majors covered?

A. 53.

Q. The number of majors?

A. 183.

Q. The number of Sun dealers?

A. Mr. Young, may I correct that. I am just adding this up mentally from these work sheets. On the non-majors may I change that? I added in some majors.

It should be 37.

Q. 37 non-majors?

A. Yes.

Q. And is the number of majors 183?

A. 182.

Q. And the number of Sun stations?

A. 28.

Q. I call your attention to the next area designated Lakeland. Would the information there be the same as for the previous Lakeland area? Would you check that for me, please, sir?

A. It doesn't cover the exact area.

Q. Were the number of stations the same?

A. The number of stations are slightly different.

Q. Would you give it to me, please?

A. In January, 1955; we had 3 independents and 35 major dealer stations; Sun stations are still 5.

[fol. 474] Mr. Henderson: Mr. Childs, for uniformity, when you speak of independents, is that the same as non-majors which you spoke of before?

The Witness: I should say non-majors.

By Mr. Young:

Q. You would say that was a normal price of 27.9?

A. It would appear to be, yes, sir.

Q. The next area is Plant City. Will you give me the information for Plant City as to the number of stations?

A. As of January 25, 1955 at Plant City we had 3 non-major dealers; 1 Sun dealer, and 24 major dealers.

Q. Is the area the same as the previous Plant City area?

A. It might be slightly different. Sometimes one salesman will ride out the artery a little further than another one.

Q. I call your attention to the Bradenton. This is right after Plant City, No. 8, the eighth area listed.

A. Bradenton on January 27 reports 37 major dealers; 5 Sun dealers, and 12 non-major dealers.

Q. All right. The last area mentioned is Jacksonville. Will you describe that area, what is covered?

A. The April 4, 1955 study?

Q. That is right.

A. This survey was not as extensive as the previous one taken. It covers 18 non-major dealer stations; 28 Sunoco dealer locations; 131 major dealer locations.

[fol. 475] Q. Does the price posted at 21.9 indicate to you a depressed price or a gasoline war?

A. I would say yes.

Q. Do you know whether or not any survey was made in Jacksonville from the period, say, December 1, 1955 through April 1, 1956?

A. I didn't get the first part of your question.

Q. Did your company, or your regional division of your company make a survey of this type in the city of Jacksonville between the dates December 1, 1955 and April 1, 1956?

A. I would think that in the normal course of business they might, but I don't know.

. . . . . .

Q. Mr. Childs, at the time that the Sun Oil Company gave Mr. McLean a 1.7 competitive price allowance—I think that was December 27, 1955—do you know the price posted at the Super-Test station across the street in Jacksonville?

A. At the time I believe the testimony is that it was 24.9.

Q. 24.9. That would put Mr. McLean within 1 cent of the Super-Test station?

A. At 25.9 he would be within 1 cent of Super-Test.

Q. I understand and I think the record shows that Mr. McLean requested a competitive allowance in order to give him an opportunity to maintain the 1-cent differential. Is that your understanding?

A. From the testimony here, yes, sir.

Q. Are you of the opinion that 1-cent differential was necessary for Mr. McLean to attract more customers in that area——

[fol. 476] Mr. Emmerglick: I object to that.

Q. —and to offset the Super-Test prices and their advertising, free offers, and so forth?

. . . . . .

The Witness: You have asked for my opinion, and based on information that we had, various studies that we had, it would indicate that McLean, from the information that I have, was not out of line in requesting this price.

By Mr. Young:

Q. And would not be out of line in requesting the price which would give him a 1-cent differential?

A. That is right.

Q. Are you of the opinion that he needed that 1-cent differential, or could he compete actively with a 2-cent spread, which was what he had prior to the C.P.A. which was granted him by Sun Oil Company?

Mr. Henderson: We object to that, if Your Honor please. I think we are getting into a metaphysical end from questions he is asking Mr. Childs, what Mr. McLean thought of so-and-so. I do not think this witness can possibly answer that type of question.

Hearing Examiner Piper: No, it calls for his opinion, Mr. Childs' opinion. Objection overruled.

[fol. 477] The Witness: I don't think I have enough information to answer that properly.

By Mr. Young:

Q. Well, the reason I asked you that, and I will base it on these surveys here which have entirely to do with Sun Oil Company following a policy in certain circumstances and under certain conditions whereby they think it is reasonable for their dealers to stay within 1 cent of a non-major. I base the question on that, if you thought that that was the situation in Jacksonville as far as McLean was concerned, if you thought that was reasonable.

Mr. Emmergfick: I object to that question. It simply takes a speech and tries to convert it into a question. I do

not think it is a question at all. Let's have him tell us the question.

Mr. Wilson: Mr. Emmerglick, that might not seem intelligent to you, but——

Hearing Examiner Piper: Objection sustained. It presupposes too much.

By Mr. Young:

Q. Mr. Childs, I believe you testified yesterday that the studies you rely on indicate that in a neighborhood such as the one that surrounded McLean Service Station, where 25 per cent or more of the people were what you referred to [fol. 478] as shifters. I wonder if you would explain just what you mean by "shifters." Are those shifters price conscious?

A. Some of those shifters are highly price conscious.

Q. And what percentage of them would be highly price conscious?

A. It could be 4 per cent. It might be higher than 4 per cent.

Mr. Emmerglick: Can we get it clear, whether he means 4 per cent of the 25?

Hearing Examiner Piper: That is the way I understand.

The Witness: It probably would be higher than 4 per cent of the total group of shifters.

Hearing Examiner Piper: That is of the 25 per cent.

By Mr. Young:

Q. Would you say that the percentage of price conscious might very well change, depending upon the difference in prices charged by the stations? In other words, if the price difference was 6 cents, the percentage might be higher than if it were 3 cents?

A. Yes.

Hearing Examiner Piper: I think he told us that 4 per cent of the overall 100 per cent were extremely price conscious, so it would follow logically from that that if you [fol. 479] take the 25 per cent of the overall who are shifters, practically all of the price conscious ones would be in there.

The Witness: More probably.

By Mr. Young:

Q. Would you say that the percentage of shifters would vary, depending upon the income bracket in which the neighborhood happened to fall?

A. That is right.

Q. It would be higher in a low income neighborhood, is that not correct?

A. I believe that is right.

Q. Mr. Childs, you stated that the Super-Test station at 19th and Pearl had a large price sign posted as one means of illustrating their low price. When Mr. McLean dropped his price on December 27, 1955, did he put up a large sign?

A. I understand so.

Q. Indicating that his price was also 3 cents lower?

A. Yes.

Q. You stated on Page 557 that the low price of the Super-Test station at 19th and Pearl, from your knowledge, had no effect on the Sun Stations in the general area, I presume with the exception of McLean's station at 19th and Peal. After Mr. McLean was granted a 1.7 CPA, dropping his price 3 cents on December 27, 1955, did you make any further survey as to the effect that this price drop would have on the Sun Stations in that area?

[fol. 480] Mr. Emmerglick: I object to that. I would like to know where the witness said on 557, where counsel says he said in the question. I do not find it.

By Mr. Young:

Q. I think Mr. Henderson asked you from your knowledge what effect the Super-Test low price had on the Sun Stations in the general area.

Mr. Emmerglick: That is correct. That is Super-Test's lower price, not McLean's lower price, and he didn't say it had no effect there. Counsel has altogether misstated the testimony in question.

Hearing Examiner Piper: What he said about the question, did he conduct the survey of the Sun Stations after the McLean Station reduced its price.

Mr. Emmerglick: That is correct. I am simply calling attention to the premise of the question at being erroneous.

Mr. Young: I will rephrase the question if you like.

Hearing Examiner Piper: Ask the question again.

By Mr. Young:

Q. You have not answered it?

A. I did not.

[fol. 481] Hearing Examiner Piper: He does not mean you yourself.

The Witness: If he means the company, I am sure that our marketing people did.

By Mr. Young:

Q. Conducted a survey subsequent to December 27 of the Sun Stations in the area?

A. I would assume they would under normal circumstances.

Q. You are not sure when it was?

A. Sometime after December 27. I am sure they did. I don't recall any dates, to my knowledge.

Q. Mr. Childs, I believe you testified earlier today that once the general price war was started in the Jacksonville area, I think sometime around the middle of February, that the overall picture as far as gallonage was concerned in Jacksonville as a whole according to this record went up and the gallonage of the Sun Stations went up approximately 55 per cent, is that correct?

A. I believe I testified that Duval County, comparing March with January, showed total actual figures 28.5 per cent increase. In Sun Stations, the total stations increased about 55 per cent.

Q. Was this price war still going on in March?

A. I believe it carried through the entire month of March.

Q. Do you know the gallonage sold during the month of March at the Sun Station at 19th and Pearl?

A. In March the Sun Station at 19th and Pearl sold a little better than 19,000 gallons.

[fol. 482] Q. Do you know the gallonage sold in January at 19th and Pearl?

A. It was over 30,000.

Q. So during the price war the gallonage at 19th and Pearl instead of increasing 55 per cent appears to have

dropped about 33 per cent. How do you account for that?

A. It was still way above its previous gallonage.

Q. What do you mean by previous gallonage?

A. Gallonage previous to December 27.

Q. But not previous to the gallonage it was selling after it received the CPA?

A. That is right.

Q. How do you account for that drop in gallonage?

A. Because all the stations in the area were at the same price, all the other majors in the immediate area of 19th and Pearl were selling at the same price as the Sunoco Station at 19th and Pearl, so they were all competing for the immediate market.

Q. And the customers went back to their regular stations?

A. In some cases they did. Of course the fact that the 19th and Pearl Street Sunoco Station held at 19,000 plus gallons would indicate that they still had some additional customers.

Q. I would like to call your attention to this map for just a minute, please, Respondent's Exhibit 5. I am indicating on the map the Sun Station located at 19th and Pearl, Mr. Childs.

A. Yes.

Q. And I see by these red lines marked on here indicating traffic flow, that apparently a direct route downtown from the suburbs, the outlying suburbs of Jacksonville, the suburbs I am noting, Lake Forest Hills, Norwood, [fol. 483] Gulfair Manor, I notice that it appears that the direct route downtown from these areas runs past the station at 19th and Pearl.

A. That could be.

Q. Yes. You see those cars could go by there.

A. They could.

Q. Now, we have one station here I presume this was the one operated by Mr. McClung. Are you acquainted with this station (indicating)?

A. That is operated by Mr. Bacon.

Q. How about this one up here (indicating)?

A. That is Mr. Winning's station.

Q. Can you indicate how far Mr. Bacon's station is in miles from 19th and Pearl?

A. Almost two miles. It is just short of two miles.

Q. You stated that the station at 19th and Pearl hung a large sign out, putting the new price on there of 25.9. As a marketing expert and having a wide knowledge of this area, through your many trips down there, don't you think it is conceivable that a large number of the customers going to this station here, which Mr. Bacon's and driving directly downtown and going by that Sun Station and seeing that big sign out there showing Sun gas at 3 cents less would stop in there and buy gas?

A. I don't think too many of the people would go by that way. I think they would go the boulevard.

Q. Go the boulevard route and right by here (indicating)?

A. Yes.

Q. Even though they heard through this word of mouth advertisement——

A. If they heard about it, but two miles away they wouldn't probably be exposed to too much word of month.

[fol. 484] Q. You don't believe that word of mouth advertising goes over two miles?

A. Over a long period of time, as time goes on, it would, but our period there was limited to about six weeks.

Hearing Examiner Piper: What boulevard are you referring to?

The Witness: It is the one parallel to Pearl and to the West.

Hearing Examiner Piper: The other red line just west of that?

The Witness: Yes. This appears to be Lem Turner Road that leads into the boulevard.

By Mr. Young:

Q. Now, I notice around this station at 19th and Pearl in an area of 18 or 20 blocks there appear to be three more Sunoco stations. Two of them are on what is noted here as Main Street. I think one is 33rd and Main. I see Main Street goes directly down into the center of Jacksonville. I see if you go down Main Street about ten blocks and make a right and go over about three blocks, you are within a block of the Sun Station at 19th and Pearl. Don't you think the people who live in this area around the station on Main Street, which is 32nd—I believe that is Crabtree's——

A. 35th and Main.

Q. Isn't that Crabtree's station?

A. McClung's.

[fol. 485] Q. Don't you think the people living in that area would get notice through word of mouth advertising of this three-cent difference in price at 19th and Pearl in shorter than a six weeks' time?

A. There might be a few.

Q. Only a few?

A. I am sure there would be a few. The Main Street stations are catering to a different arterial traffic. Quite a bit of their customers come from transients and people generally along Main Street.

* * * * * * *

Q. Mr. Childs, are you acquainted with the service station that was operated by Mr. Crabtree about this time?

A. Yes.

Q. Do you know the location of that station?

A. I do.

Q. How many blocks is that from 19th and Pearl?

A. I wouldn't know in blocks, but it is Main and Tullulah, which is somewhere around 60th Street, so it must be at least 40 blocks going north and several blocks over to the east.

Q. Mr. Crabtree testified that he was under the impression that he was considerably injured by the low prices at 19th and Pearl——

Mr. Henderson: I object. There is no such testimony that could be referred to. We all recall Mr. Crabtree's testimony.

Mr. Young: I withdraw the question.

[fol. 486] By Mr. Young:

Q. Mr. Childs, it states in the record that Mr. Crabtree's gallonage after the gas war started, went up 250 per cent. Now that is based on the previous month, as I recall.

A. March against January. February was a split month and we didn't make a comparison, because we felt it would be meaningless.

Q. Did you say 40 blocks away from 19th and Pearl?

He went up there 250 per cent. The other station dropped 33⅓ per cent. Don't you think it is possible that some of the customers from Mr. Crabtree's station might have come back to Mr. Crabtree?

A. I wouldn't think it would have been any appreciable number that would. Experience wouldn't indicate that to be the normal situation.

Hearing Examiner Piper: There must have been competitors around Mr. Crabtree's station.

The Witness: Right.

Hearing Examiner Piper: What would be your explanation of the fact that his gallonage would be 250 per cent increase?

The Witness: I don't know, unless his other competitors were slower in meeting a reduced price. Sometimes they don't all go down. We find that some dealers are reluctant to go down until they use up the gasoline they have in their tanks, and that is why they sometimes put it off. I wouldn't know.

[fol. 487] Hearing Examiner Piper: Was that just a one month's figure?

The Witness: That is for the month of March, yes, sir.

Hearing Examiner Piper: But all of your stations increased their gallonage more than the overall increase for the company?

The Witness: The total of all of our stations did.

Hearing Examiner Piper: Do you have any explanation for that, why Sun Oil stations got more of the increase than the rest of the stations?

The Witness: That could be explained by a point I believe I brought out yesterday, that when this differential gets greater we, because of our premium quality, have an advantage to the competitive major dealers' premium customer on the basis that the major dealer doesn't reduce his premium, and that would tend to explain why we do pick up a plus gallonage.

By Mr. Young:

Q. Mr. Childs, in connection with your statement concerning the relative position of the Sun station at 19th and Pearl, you stated on page 559 that some of the people, when they came to this particular corner, drawn there by

Super-Test's advertisement—I added that, drawn there by Super-Test's advertisement; I presume they were drawn there by Super-Test's advertisement rather than a [fol. 488] big sign hung out by Sun—you said that when they came there they saw the lower price that was being posted by the Sun station, and rather than buy Super-Test gasoline they bought Sun gasoline. Is that correct?

A. That is correct.

Q. Can't you conceive that some of the people who were buying Sun gasoline in these low-income areas located near the Sun station might decide that "26 cents is quite a bit, so we will go down and buy the Super-Test," and when they got there and saw the 3 cents under posted by Sun, that they went in and bought the gas from Sun Oil Company?

A. I think there could be a few of those.

Q. Only a few?

A. Well, on the basis that the advertising only appeals to a few hard core buyers who happen to read it. Again, there would only be a small core of Sun customers of other stations who would recognize the situation and know about it through the Super-Test advertising. If we had not been posting it the Super-Test station would have gotten them.

. . . . . .

Now, I understand from what Mr. Beardsley previously said on the record, that Mr. McLean never dropped his price any further than 25.9.

Do you know whether or not any of the stations in the immediate area on January 13 dropped their price in order to more effectively compete with the Super-Test station?

A. The Royal Arrow station next to McLean had followed Super-Test's price.

Q. That is an independent or a non-major?

[fol. 489] A. That is right.

Q. Do you know whether or not Royal Arrow and Super-Test held this 23.9 price until the middle of February when the gas war started?

A. I believe they did.

. . . . . .

Q. Mr. Childs, in your opinion was not Super Test compelled to sell gasoline at a lower price, in this instance 23.9, in order to compete with the Sun station across the street?

Mr. Emmerglick: At what price and at what time?

Mr. Wilson: He named the price.

Mr. Emmerglick: He did?

Mr. Wilson: 23.9.

Mr. Young: 23.9, at the time McLean was selling his gasoline at 25.9, from December 27, 1955 until February 20, 1956, when McLean went out of business.

Mr. Henderson: Do you understand the question Mr. Childs, or would you like it repeated?

[fol. 490] The Witness: I think I understand the question.

It is my opinion that they weren't compelled to. It would depend entirely on the volume that they desired to have and how rapidly they tried to build up the station.

By Mr. Young:

Q. Mr. Childs, do you think Super-Test could compete at the same price?

A. The same as what?

Q. The same as Sun, 25.9?

A. If they gave the same service that we did they might compete.

Q. Selling octane gas 87½?

A. It would depend on other conditions. Do you mean at this location?

Q. Yes, sir.

A. I would assume we would do more business than they would at the same price.

Q. Would you assume they could compete?

A. It depends on what you mean by compete. I wouldn't think they would, necessarily go out of business at the same price; maybe they would, but I wouldn't think so.

Q. Well, they would not make much money, though, would they?

A. They would make more money if they sold at the same price we did.

Mr. Young: That is all I have.

Mr. Emmerglick: I have just a few questions and I will be through, if you do not mind sitting, Mr. Examiner. [fol. 491] Hearing Examiner Piper: Very well.

Redirect examination.

By Mr. Emmerglick:

Q. Mr. Childs, I would like to direct your attention to the price study areas referred to on Respondent's Exhibits 7 and 8, as to which you were questioned on cross-examination.

First as to Respondent's Exhibit 7, beginning with the Philadelphia-69th Street area:

Did you set the area for each of the 14 price studies as being a single, distinctive market in which all of the gasoline stations were in competition with each other.

A. No, they are not all in competition with each other. They compete in their immediate neighborhood, but the effect in some of these areas of price depression is they carry on from area to area along main arteries, so we try to cover the maximum area in which we might find ourselves involved in price problems.

Q. Does each of these price study areas embrace but a single neighborhood, as you have used that word?

A. No, those studies cover rather wide areas.

Q. Would I be correct in saying that these areas were the kind of area you would examine in a price war situation if you used the simile of throwing a pebble into a smooth pond then watching where the ripples went.

A. That is exactly the way these price wars carry, from point to point. It travels down the artery from station [fol. 492] to station as the dealer becomes hurt and drops his price.

Q. Now, were the areas in Florida selected in the same way, substantially?

A. I would think substantially the same.

Q. I believe you testified, and I would like to be clear about this, that there were three things operative at 19th and Pearl Streets when the Super-Test station price was down and before Sun gave voluntary assistance to McLean. I understood you to say, that they were: Visual

signs, word-of-mouth advertising, and the newspaper advertising throughout the area carried in the Florida Times-Union.

Prior to December 27, 1955, was there any other Sun dealer in Jacksonville confronted with all three of these factors?

A. No, sir, none other than the 19th and Pearl Sun dealer.

[fol. 493] BEFORE FEDERAL TRADE COMMISION

Room 332
Federal Trade Commission Building
Washington, D. C.

Tuesday, June 4, 1957.

Met, pursuant to adjournment, at 2:00 p.m. Before: Robert L. Piper, Hearing Examiner.

APPEARANCES:

Rufus E. Wilson and Ross D. Young, Attorneys for the Federal Trade Commission.

Joseph W. Henderson, 1910 Packard Building, Philadelphia, Pennsylvania:

Leonard J. Emmerglick, Tower Building, Room 1021, Washington, D. C.

J. Blair Moffett, 1608 Walnut Street, Philadelphia, Pennsylvania; and Henry R. Frye, 1608 Walnut Street, Philadelphia, Pennsylvania, Attorneys for the respondent.

[fol. 494] MISS DELMA GOODWIN was thereupon called as a witness for the Respondent and, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Emmerglick:

* * * * * * *

Q. Are you employed by Super Test Oil Company, Incorporated?

A. Yes, I am.

Q. In what capacity?

A. Office Manager.

Q. How long have you been employed by Super Test?

A. Between eight and nine years.

Q. Will you tell us, in a general way, what duties you perform for Super Test now?

A. Well, I keep some of the books, and I run the general office routine, do the hiring, and I instruct each girl in her duties, and set up the system for auditing and filing, and handle all the cash.

Q. Is record keeping of the company under your supervision?

A. Yes.

* * * * * * *

Q. How many people are there working under your supervision?

A. Ten.

[fol. 495] Q. Have you appeared here today because there was a subpoena served upon Super Test Oil Company to produce some records here?

A. Yes.

* * * * * * *

Q. Have you produced the records called for by the subpoena?

A. Yes.

Q. Do you have here daily reports for the Super Test Station at 2820 Pearl Street, Jacksonville, Florida, commencing with the date that it began to do business until sometime in March or April 1956?

A. Yes. The address, I don't know if that is correct, I believe it is the 1900 block on Pearl Street.

* * * * * * *

[fol. 495a] Q. Is that right?

A. Yes.

Q. Will you let me see those records, please, Miss Goodwin?

(The witness handed the records to Mr. Emmerglick.)

A. I noticed that the very top sheet here is called "A Daily Report," and bears the date at the bottom June 26, 1955, Station Number 229, will you tell us what this report form is?

A. This is a daily sales sheet that is taken from meter [fol. 495b] readings on the gasoline pumps and from stock

readings on oil and is a summary of the sales in that station for the day. It is made up by the station manager.

Q. And how does it come to your office?

A. By mail.

Q. And when it gets to your office, who receives it?

A. Our receptionist gets the mail and it is opened and the records are given to me, and I, in turn, give them to a girl who keeps them, and then another one audits them and posts them into a ledger and they are filed.

Q. Now, is this done with respect to every one of the Super Test stations?

A. Yes.

Q. Approximately how many stations were making reports like this in June, July, August, and so on, 1955?

A. Approximately 65 stations, I would say.

. . . . . .

Q. And is there a further figure for gas sold to trucks from a truck pump at the station?

A. Yes.

Q. And do these reports show the posted prices at which the sales were made from day to day?

A. Yes.

Q. Now, have you gone over these reports at my request to set up from the reports a number of figures as to gallonage and price?

A. Yes, sir.

Q. Do you have that there?

A. Yes.

. . . . . .

COLLOQUY BETWEEN HEARING EXAMINER AND COUNSEL

Hearing Examiner Piper: I take it you are going into the question of all Super Test sales?

[fol. 496] Mr. Emmerglick: No, all that we are planning to do is show you that this Super Test station, when it reduced the price for a few days, had an enormous gain in its gallonage at the expense of McLean, and that when its price went back, that its gallonage went down. And, we are also going to show this very important fact in support of the testimony of Mr. Childs that after Decem-

ber 27, when McLean's price assistance was given to him by Sun, and he lowered his price, the Super Test gallonage went up, so that while it had been doing something like thirteen thousand gallons a month before, it was doing sixty-seven thousand gallons a month. That gallonage was being taken not from McLean, but being taken quite generally from the community. And, to the extent that Super Test was drawing this gallonage, it was drawing very much more than McLean was drawing, to the extent then any other Sun dealer in Jacksonville might have been losing gallonage, we do not have much evidence of that. I think we have one witness, Crabtree, whose books are being produced, who testified that he saw some of his customers over at McLean's station. But to the extent that gallonage was being lost in Jacksonville, it was being gained at Super Test to a much greater degree than it was being gained at McLean's station.

Now, what we plan to do is a simple demonstration from a few figures of the history of the Super Test gallonage at this station.

Hearing Examiner Piper: I thought the question that was pending that he objected to dealt with much more than this station.

[fol. 497] Mr. Emmerglick: These records relate only to this station.

Hearing Examiner Piper: This one station?

Mr. Emmerglick: This one station.

. . . . . .

Hearing Examiner Piper: It seems to me to contend that a large oil company would enter into a price fixing arrangement with one dealer in an area and not give the same price to all of its other dealers in the same city, is to argue the absurd. Obviously, they would not do so. They must have had some reason for doing so, nevertheless, they would not just say, "Tomorrow, McLean, let's you and I get together and fix prices for no reason at all," when they have one-hundred and twenty dealers or whatever the facts may be, in the same city. Now, we all know the facts of life. We know that what was involved here was a local price war apparently, which arose in

that neighborhood, and McLean, the dealer involved, was losing a lot of business.

Now, what happened after that is one of the issues in the case. We do know, I guess it is undisputed, if I am wrong, correct me in that, there was competitive price allowance given or that McLean was given a lower price, however it works out, then he had been paying and lower than the other Sun-dealers got. As I see it, the facts alleged in Count 1 are not any different than the facts alleged in Count 2. It is the same state of affairs.

(fol. 4981) Mr. Wilson: Except you have a different law.

Hearing Examiner Piper: Except you plead it as two different violations. But in Count 1, you do not have to prove that there was any agreement to show the price discrimination. In Count 2, you have to prove that there was an illegal agreement between the two.

Now, to prove that, to persuade anyone that there was such agreement, there has to be some evidence of logic to it; nevertheless, as I said, to one dealer and one dealer and a large oil company do not enter into a price fixing agreement with their own dealer in a vacuum for no reason. Nevertheless, it has to make sense, there has to be a reason.

Mr. Wilson: There has to be a why.

Hearing Examiner Piper: Yes, and an answer to why.

Mr. Wilson: Do you recall Mr. Gravatte's testimony in Philadelphia as to his conversation with Mr. Dietsche? And, he said that Mr. Dietsche told him that the independents in Jacksonville had acquired an unusually large share of the market? Do you recall that testimony?

Hearing Examiner Piper: Well, that gets us back to where we were. Now you are back to the predatory cutting of price.

(fol. 4991) Mr. Wilson: All right, if I am back, I am back. That takes it out of the vacuum class, doesn't it?

Hearing Examiner Piper: Yes, because I see no point in the second Count if it is the same thing as the first Count. Nevertheless, if it is found that they violated the Robinson-Patman Act by this course of conduct, a cease and desist order will be issued that will be just as strong as if I found that they also violated Count 2 or Section 5 of the Federal Trade Commission. It would not change the cease and desist order, the effect of it, any. It might

add a provision or two, but would not change the effect any.

And actually, it seems to me that Count 2 seeks to go after something different that Count 1; nevertheless, predatory pricing. Otherwise, it is the same thing all over again. And, if I understand you, the reason you argue that they did enter into an agreement to fix prices was to hurt independents or the particular independent.

Mr. Wilson: Well, it was Mr. Dietsche's position and ——

Hearing Examiner Piper: (Interposing.) Well, is that right?

Mr. Wilson: I think that Sun Oil Company—that the independents having an unusually large share of the market, they would enter into the arrangement that they did at this particular place.

[fol. 500] Hearing Examiner Piper: For what reason, to cut down that share of the market?

Mr. Wilson: Recoup their gallonage, yes, sir. Red Arrow was an independent too, you know.

Hearing Examiner Piper: Well, I think we have probably wasted more time than if I had taken it in the first place. I will overrule the objection.

Mr. Wilson: Is that to be restricted to Count 2?

Hearing Examiner Piper: Well, for what it is worth, but I do not see any particular value to Count 1, but I can see some possibility under Count 2.

Mr. Emmerglick: I would like to suggest ——

Hearing Examiner Piper: (Interposing) I know what your point is under Count 1. I do not agree with you necessarily. I have not made up my mind one-hundred percent.

Mr. Wilson: Just one second, in order that I may be clear, if Your Honor please, of course, you realize that as far as Count 2 is concerned, his is demonstrating their good faith in entering into this, just like in the Fashion Originators' Guild Case, these people tried to demonstrate [fol. 501] their good faith in boycotting or excluding those who had stolen those ——

Hearing Examiner Piper: (Interposing) No, I do not think so, it is more fundamental than that. If it were that, I would not take it, because I agree with you, as I said before, price fixing is illegal per se and even though you enter into an agreement to fix prices in good faith, you are still in violation of the law under the decisions of the Supreme Court, as I read them. There is no justification

for price fixing, as I see it. I am not receiving this as justification. I am receiving it to cast light upon the question of whether or not there was any price fixing agreement. I think it may well lend some light to that. Then, there are other points that Mr. Emmerglick make, on which I said I am not one-hundred percent satisfied that he is wrong. I am inclined to think that probably he is and your position is right, but I would rather lean on the side of receiving it than excluding it.

. . . . . .

Q. Miss Goodwin, referring to your original records, the tickets you have taken off on those yellow sheets, will you give me, please, for the period of June 26 to June 30, 1933, for this one station at 19th and Pearl Street, the gallonage of regular gasoline sold?

A. Five hundred thirty-one.

Q. Gallons of premium gasoline sold?

A. One hundred twenty-seven.

Q. Price of regular?

A. 26.9 and 28.9.

Q. 26.9 or 28.9 for ethyl?

A. Yes.

Q. 26 for regular?

A. Yes.

Q. Now, for the month of July, 1933, at this station, how many gallons of regular were sold?

A. Five thousand forty seven.

Q. And premium?

A. 1239.

Q. And were the prices the same as the previous month?

A. Yes.

Q. Now for the month of August, how many gallons of regular were sold?

A. Fifteen thousand three hundred.

Q. And for premium, how many gallons?

A. Four-thousand two-hundred ninety-two.

Q. Now, for how long in August were those sales made at 26.9 for regular and 28.9 for premium?

A. We had a price change on the 27th.

Q. Now, on the 26th when the price was still 26.9 for

regular and 28.9 for premium, how many gallons of regular were sold?

A. One-hundred twenty-seven and twenty-one from the truck pump.

Q. Twenty-one from the truck pump?

A. Yes.

Q. Now, was the gallonage sold from the truck pump sold at a lower price than 26.9?

A. Yes, at 24.9.

Q. Is that a regular practice?

A. Well, it is customary that trucks get a two cent discount and this one pump takes care of that discount automatically.

[fol. 503] Q. So you sold one-hundred twenty-seven regular on the 26th, plus 21 regular from the truck pump, and how many of the premium?

A. Twenty-five.

Q. Now, on the twenty-seventh, were there still some sales at 26.9 for regular and 28.9 for premium?

A. Yes.

Q. What is the gallonage?

A. Only eleven gallons sold at 26.9 and seven from the truck pump for 24.9.

Q. How many at 28.9 for the premium?

A. Seven.

Q. Now, on the 27th, the price of regular was dropped to what?

A. 21.9.

Q. Now, after that drop on the 27th, now many gallons were sold of regular?

A. Three-thousand five-hundred eight-three, and from the truck pump two-hundred sixty-three.

Q. And they were sold, the last that you mentioned, at what price?

A. At 21.9.

Q. When the price went down that low, then, the truckers do not get any further discount is that right?

A. That is right.

Q. How many gallons of premium were sold after the drop in price on that day?

A. 1324.

Q. At what price?

A. 23.9.

Q. On the 28th, was the price still down to 21.9 for regular?

A. For part of the day, it changed on the 28th.

Q. Changed on that day?

A. Yes.

[fol. 504] Q. Now, while it was down to 20.9, how many gallons regular?

A. 4931 and 278 from the truck pump.

Q. And how many gallons of premium were sold?

A. 1611.

Q. Now, then, on the 28th, the price went up again, did it, to 26.9 and 28.9.

A. That is right.

Q. And then when the price was changed up how many gallons were sold on that day at the new price?

A. 134, and 4 from the truck pump.

Q. That is regular, altogether?

A. Yes.

Q. How many high-test or premium?

A. 31.

Q. Now, on the 29th, did you have a full day of pricing at 26.9?

A. Yes.

Q. And 28.9 for premium?

A. Yes.

Q. What was the gallonage sold that day?

A. Four hundred eight and thirty-eight from the truck pump.

Q. That would be regular?

A. Yes.

Q. And at premium, how much?

A. One-hundred thirty-seven.

Q. Now, let us pass to the month of September, for the month of September 1955, what was the gallonage of regular sold?

A. Ten thousand six-hundred ninety-four.

Q. And premium?

A. Two-thousand six-hundred ninety-three.

Q. Was that all at 26.9 and 28.9 prices?

A. Yes.

[fol. 505] Q. Now, in October, did those prices continue?

A. Yes.

Q. What was the gallonage in October?

A. Regular, ten-thousand nine-hundred twenty-five, and ethyl, two-thousand six-hundred and forty-eight.

Q. And in November, did the same prices continue?

A. Yes.

Q. What was the gallonage of each type of gasoline in November?

A. Eleven-thousand sixty-six regular and two-thousand three-hundred and ninety ethyl.

Q. Now, I would like to take you through a number of days in December. In the first place, would you give me the total sales of regular and premium in December for the whole month?

A. Regular was 18,960, and ethyl 3,954.

Q. When did you get the first drop in price in December?

A. It was on the fourth.

Q. All right now, going back to December 1, will you give us the figures for the three days preceding the fourth, for sales of regular and premium at 26.9 prices, and then at the truck discount price, and then for premium at the 28.9 price?

A. On the first, two-hundred seventy-eight regular, and one-hundred fifty-six from the truck pump at 24.9; the regular price was 26.9, and sixty-eight ethyl at 28.9.

Q. On the second?

A. On the second, three-hundred thirteen regular; ninety-eight from the truck pump and seventy-seven ethyl at the same prices. And on the third, four-hundred eighteen regular, one hundred thirty-five from the truck pump, and sixty-nine ethyl at the same price.

[fol. 506] Q. Now on the 4th, what was the price of regular dropped to?

A. 21.9 and 24.9.

Q. 21.9 for regular and 24.9 for ethyl, wasn't it?

A. Yes.

Q. Now on the 4th, how many were sold regular?

A. Two-thousand two-hundred twenty-six.

Q. And from the truck pump?

A. One-hundred forty-eight.

Q. And how many gallons of premium?

A. Five-hundred.

Q. Now, on the fifth, did the price go back to 26.9 for regular?

A. Yes.

Q. How many gallons of regular sold on the fifth?

A. Three-hundred twenty-two.

Q. About one-seventh of the gallonage sold the day before. Is that right?

A. Yes.

Q. And the price was 21.9. How many gallons for the truck pump?

A. Forty-eight.

Q. And how many gallons of premium at 28.9?

A. One-hundred forty.

Q. Now, was there another price drop on the 12th of December?

A. Yes, there was.

Q. Now, in the interest of saving time, perhaps we can go down to the 13th. Was there a price drop to 21.9 according to your records, on the 13th?

A. Yes.

Q. Will you give me the total picture on the 13th of the sales and prices prevailing on that day?

A. Before the price change there was one-hundred forty-one and thirteen from the truck pump——

[fol. 507] Q. (Interposing) Now, the one-hundred forty-one sold at what price?

A. At 24.9.

Q. That was already a price drop?

A. Yes, and then dropped to 21.9, five-hundred ninety-six gallons sold and one-hundred eighty-one from the truck pump for 24.9.

Q. On the 14th, the next day, how many gallons of regular were sold at 21.9?

A. 1149 and 123 from the truck pump.

Q. Now, when the price went up to 26.9 on the 17th, how many gallons of regular were sold? On the 16th.

A. It was on the 15th, there were sixty-six sold at 26.9, and then for the full day of the 16th, which was three-hundred seventeen gallons.

Q. Now, let's take the 26th of December, the day after Christmas. How many gallons of regular were sold and at what price?

A. Four-hundred eighty-nine at 26.9, and one-hundred fifty-six from the truck pump for 24.9.

Q. Now, on the 27th, was there a price change?

A. Yes.

Q. Now, what were the sales made on the 27th and at what prices?

A. The first part of the day there were two-hundred three gallons at 26.9 and one-hundred eight from the truck pump at 24.9, and then the price dropped to 24.9, fifty-five gallons and twenty-two from the truck pump at 23.9.

Q. Now, the next day, when you had a full day of sales at this lowered price, what was the gallonage?

A. Five-hundred twenty-one gallons, and one-hundred four from the truck pump at 24.9 and 23.9.

Q. And next day, 29th, did that go up?

[fol. 508] A. No, it was still the same.

Q. I mean the gallonage.

A. Five-hundred eighty-one gallons and one-hundred twenty-one from the truck pump.

Q. The next day, the 30th, was there a further increase in gallonage in sales?

A. Yes, six-hundred ninety-three and fifty-two from the truck pump.

Q. Was there an increase in sales of ethyl also?

A. Yes, slightly.

Q. Now, on the 31st, was there a further increase in sales of regular?

A. Yes, one-thousand sixteen regular and one-hundred from the truck pump.

Q. Now, into January 1956. What was the total gallonage sold in January 1956 of regular and high-test?

A. Regular was sixty-one thousand six-hundred seventy-two gallons.

Q. And high-test?

A. Seven-thousand eight-hundred ninety.

Q. Now, you went into January with this 24.9 price and was there a time in January when that price was lowered, in the first part of January?

A. Yes, on the 3rd.

Q. To what price?

A. 23.9 for regular and 26.9 for ethyl.

Q. Now, on the next day, after the price was lowered, on January 4, what were the gallonage figures for regular and premium?

A. Nine-hundred and forty-two regular and one-hundred eleven from the truck pump, and one-hundred forty-four ethyl.

Q. And on the 5th, did that regular volume go up?

A. Yes one thousand regular and one-hundred seventy-seven from the truck pump.

[fol. 509] Q. And by January 27th, what was the volume of regular and premium sold? What were the sales on the 27th?

A. There was 1654 regular and 464 from the truck pump and 350 ethyl.

Q. Now, will you give me the total gallonage sold by that station in February?

A. Sixty-seven thousand one-hundred fifty-six regular and eight-thousand five-hundred twenty-nine ethyl.

Q. And in March?

A. Twenty-seven thousand twelve regular and four-thousand nine-hundred thirty-seven ethyl.

Q. Now, between February 1st and the end of March, notably in the middle of February, was there a further lowering of price?

A. Yes.

Q. Was the price lowered on the 16th of February?

A. Yes.

Q. To what?

A. To 22.9 regular and 25.9 for ethyl.

Q. And again at the end of February was there a further lowering of price?

A. On the 28th it went to 19.9 for regular and 22.9 for ethyl.

Q. Now, on the 28th, what was the volume of sales of regular and premium?

A. One-thousand ninety-seven regular and two-hundred thirteen from the truck pump, and one-hundred seventy-two ethyl.

Q. Now, that was a full day of pricing as far as the records show?

A. Yes.

Q. At those prices?

A. Yes.

Q. Now, the next day, 29th, was that a full day of pricing at the same price?

[fol. 510] A. Yes.

Q. Now, according to the records, did the volume go up or go down?

A. It went down.

Q. What was the volume of regular sold on February 29?

A. Six-hundred eighty-six gallons.

Q. How many from the truck pump?

A. One-hundred twenty-two from the truck pump.

Q. That was all at 19.9?

A. Yes.

Q. Now, I think you gave me the figures for March, did you?

A. Yes.

Q. Will you repeat it?

A. Twenty-seven thousand and twelve on regular and four-thousand nine-hundred thirty-seven on ethyl.

* * * * * * *

Mr. Henderson: If Your Honor please, the government has furnished us with copies of—the original, I take it—of the reports of Mr. Gravette which we have read. In order not to delay this hearing further, I am prepared to ask Mr. Gravatte to take the stand and ask him a couple of questions concerning one of these statements.

Hearing Examiner Piper: All right. Mr. Gravatte, return to the stand.

[fol. 511] Robert H. Gravatte, Jr., was thereupon recalled as a witness for the Commission and, having been previously duly sworn, testified as follows:

Mr. Henderson: Without getting into any extended discussion, if Your Honor please, we should like to be furnished with copies of these statements. We know we are not entitled to the originals at all. I make that request.

Further Cross-examination.

By Mr. Henderson:

Q. Mr. Gravatte, you have already been sworn in this case and you are a lawyer. I am referring to page 438 of the testimony, and to make it simpler for you, sir, I am showing you the testimony starting on line one of 438,

through line nine, and would ask if you would please read that, sir, it was your testimony given previously.

A. Mr. McLean said——

Q. (Interposing) I did not ask you that sir, you are a lawyer.

Hearing Examiner Piper: To yourself.

The Witness: (After reading) I have read it.

By Mr. Henderson

Q. All right, now, the paper that has been given to me by the government which is the second sheet, Field Report [fol. 512] No. 2, File Number 5 million, 610 thousand eighty, Informant, Mr. Gilbert V. McLean—and it has a stamp "51" on it.

A. Yes.

Q. Now, on the last few lines on that page, starting on the fourth of the bottom line, this I read now from the report. "They said," and I assume by that you mean Sun, "they would give him a one point seven discount and he agreed to cut his margin of profit by one and three-tenths cents so that he could sell his gasoline for three-cents lower." Is that the statement that Mr. McLean made to you at that time?

A. That is the substance of the statement, yes.

Q. "He dropped his price from 28.9 cents to 25.9 cents on that date. He believes that the Super-Test station across the street was then selling for 23.9 cents, that he was still two cents above it although not five cents above them as he had been on several previous occasions." That is again your direct recollection of what was said at that time?

A. That is correct.

Q. "Informant is willing to cut his price margin of profit by one and three-tenths cents because he anticipated that his sales would increase so much that he was making more money." That is from your report and that is correct, is it not?

A. Yes.

Q. Do you wish to see what I read?

A. No, I recall.

Q. Your memory has been refreshed and that is correct testimony?

A. That is right.

• • • • • • •

[fol. 513] Mr. Henderson: With the exception of this famous Crabtree document, I think it is all taken care of, and if it is proper, why, we wish to renew our motion to dismiss, which Mr. Emmerglick may take care of.

Hearing Examiner Piper: Well, it is proper, but you have already argued it.

Mr. Emmerglick: You reserved decision on one part of it. You denied the motion as to the first count. As to the second count you said that you reserved the decision. My point being, to state it very briefly, to refresh your recollection, that on the Commission's own case, giving the evidence the most favorable inferences that could be applied to it, there was no proof of agreement to fixing prices such as illegal under the Anti-Trust laws. We renew that motion.

Hearing Examiner Piper: I will still reserve ruling on it. Does the government rest?

Mr. Wilson: The government rests.

• • • • • • •

CLERK'S NOTE RE PAPERS OMITTED

Argument of Counsel for Respondent;

Argument of Counsel for Federal Trade Commission;

Rebuttal Argument of Counsel for Respondent;

[fol. 514] Rebuttal Argument of Counsel for Federal Trade Commission;

Omitted from the printed record pursuant to designations of counsel as to printing record copied at Pages 1 & 12.

• • • • • • •

Commission's Exhibit 1—Bills, Sun Oil Company to Gilbert V. McLean;

Commission's Exhibit 2—Bills, Sun Oil Company to Jesse P. McClung;

Commission's Exhibit 3—Bills, Sun Oil Company to Bill Crabtree;

Commission's Exhibit 4—Bills, Sun Oil Company to W. R. Bacon;

Commission's Exhibit 5—Dealer's Agreement Between Sun Oil Company and Gilbert V. McLean dated 2/4/55;

Commission's Exhibit 6—Dealer's Agreement Between Sun Oil Company and W. R. Bacon dated 8/17/53;

Commission's Exhibit 7—Dealer's Agreement Between Sun Oil Company and Bill Crabtree dated 6/29/54;

[fol. 515] Commission's Exhibit 8—Dealer's Agreement Between Sun Oil Company and Jesse P. McClung dated 8/11/55;

Commission's Exhibit 9—Dealer's Agreement Between Sun Oil Company and Peery Industries, Inc. dated 7/15/55;

Commission's Exhibit 10—Dealer's Agreement Between Sun Oil Company and Clair R. Winning dated 6/21/55;

Commission's Exhibit 11—Bills, Sun Oil Company to Clair Russell Winning;

Commission's Exhibit 12—Bills, Sun Oil Company to Peery Industries, Inc.;

Commission's Exhibit 13—Bills, Sun Oil Company to Sun Station #603-23;

Commission's Exhibit 14—Statement, Willard W. Wright, General Sales Manager, Sun Oil Company Before Subcommittee on Retailing, etc.;

Omitted from the printed record pursuant to designations of counsel as to printing record, copied at Pages 1 & 12.

* * * * * * *

[fol. 516] BEFORE FEDERAL TRADE COMMISSION

COMMISSION EXHIBIT NO. 15-A

Date 2-4-57

Location—Present Dealer—October, 19 —Dates.

1500 Phillips Hwy., Jacksonville, Fla., Frank L. Amboyer, Same.

6025 Roosevelt Blvd., Jacksonville, Fla., George L. Atchley, Same.

5903 Norwood Avenue, Jacksonville, Fla., W. R. Bacon, Same.

2144 Blanding Blvd., Jacksonville, Fla., Thomas D. Beecher, Walter Larson, Rt. 5, Box 528 A, Jacksonville, Fla., to 10-3-56.

3750 New Beach Blvd., Jacksonville, Fla., Andrew Bell, Robert W. Myers, 1205 Arlington Road, Jacksonville, Fla., to 7-27-56.

3403 West Beaver St., Jacksonville, Fla., Angelo Caporali, Same.

10615 New Kings Road, Dinsmore, Fla., Bruce E. Chapman, William A. Willis, 12-9-55 to 6-8-56, Jasper Fla., Company operated 9-30-56.

1104 Cassat Avenue, Jacksonville, Fla., Est. of Geo. E. Dodrer, George E. Dodrer, Deceased, to 1-4-57.

19th & Pearl Street, Jacksonville, Fla., John C. Duane, Jr., Elwood P. Crafts, North Main St., Warehouse Point, Conn. to 6-30-56. Company operated to 3-23-56. Gilbert V. McLean, 557 W. 16th St., Jacksonville, Fla. to 2-22-56. [fol. 517] Location—Present Dealer—October, 19 — Dates.

8th & Liberty Streets, Jacksonville, Fla., O. A. Ginn, Same.

9925 Beach Blvd., Jacksonville, Fla., Robert A. Hardy, Same.

12615 Main St. Road, Oceanway, Fla., Thomas E. Hawthorne, Same.

6706 Main Street, Jacksonville, Fla., Kenneth J. Howard, Bill Crabtree, 350 W. 25th St., Jacksonville, Fla. to 9-11-56.

11 Phillips Hy., Jacksonville, Fla., Dale M. Jenkins, Robert L. Williams, 2116 West Road, Jacksonville, Fla., to 2-9-56.

5600 U. S. #1, North Jacksonville, Fla., Harold J. Jenks, Company operated 6-1-56 to 7-31-56. William J. Larsen, 4635 Suray Avenue, Jacksonville, Fla., to 5-31-56.

BEFORE FEDERAL TRADE COMMISSION

COMMISSION EXHIBIT No. 15-B

Date 2-4-57

5403 Normandy Blvd., Jacksonville, Fla., Knize & Gratt, Chester Maliszowski, 6177 Cedal Hills Blvd., Jacksonville, Fla., to 11-9-56.

10857 Phillips Hwy., Jacksonville, Fla., John Kraieski, Velton C. Hall. 11156 Phillips Hy., Jacksonville, Fla., to 11-20-56.

[fol. 518] Location—Present Dealer—October, 1955—Dates.

7136 Atlantic Blvd., Jacksonville, Fla., Robert J. Lamb, Jr., None—new.

430 College Street, Jacksonville, Fla., Lightsey & Winstead, Same.

2970 Post Street, Jacksonville, Fla., Alan W. Lindell, Company operated, 11-24-56 to 12-21-56, Clifford A. Rood, 4606 Royal Avenue, Jacksonville, Fla., to 11-23-56.

303 Riverside Avenue, Jacksonville, Fla., Frank J. Maret, Same.

4320 Main Street, Jacksonville, Fla., Company operated, Milton F. Mobley, 3043 Post Street, Jacksonville, Fla., 6-1-56 to 12-31-56, Company operated, 2-28-56 to 5-31-56, Jesse P. McClung, 4724 Sunderland Road, Jacksonville, Fla. to 2-27-56.

1205 Arlington Road, Jacksonville, Fla., Robert W. Myers, None—New.

2057 Main Street, Jacksonville, Fla., William T. Pearce, Peery Industries, Inc., P. O. Box 361, Easton, Md., to 9-7-56.

1604 San Marco Blvd., Jacksonville, Fla., D. H. Penoyer, Same.

528 Beach Blvd., Jacksonville Beach, Fla., Ralph W. Pope, Robert W. Atkinson, 205 Hopkins Street, Neptune Beach, Fla., to 10-31-56.

4196 Herschel Street, Jacksonville, Fla., Poppell & Bown, Same.

1506 Atlantic Blvd., Jacksonville, Fla., Company operated, Same.

6005 San Jose Blvd., Jacksonville, Fla., Edward R. Ross, Same.

1064 Edgewood Avenue, Jacksonville, Fla., Floyd Hardy Smith, Same.

757 Park Street, Jacksonville, Fla., Jack O. Snowberger, Same.

[fol. 519] BEFORE FEDERAL TRADE COMMISSION

COMMISSION EXHIBIT No. 15-C

Date 2-4-57

Location—Present Dealer—October, 1955—Dates.

3406 Expressway, Jacksonville, Fla., Richard V. Van Kleeck, None, Opened 1-13-56.

5609 Beach Bldvd., Jacksonville, Fla., Richard V. Van Kleeck, Jr., Same.

375 Atlantic Blvd., Atlantic Beach Fla., Rich V. Van Kleeck #2, Frank T. Ray, Jr., 205 Hopkins Street, Neptune Beach, Fla., to 9-30-56.

1808 Kings Avenue, Jacksonville, Fla., Rudolph V. Wiggin, Andrew Bell, 3750 New Beach Blvd., Jacksonville, Fla., to 7-20-56.

8028 Lem Turner Road, Jacksonville, Fla., Clair R. Winning, Same.

1065 Kings Road, Jacksonville, Fla., G. B. Griffin, Same.

BEFORE FEDERAL TRADE COMMISSION

COMMISSION EXHIBIT No. 16

Date 2-4-57

Peery Industries, Inc.
11th & Main Street
Jacksonville, Fla.
Phone Elgin 4-8095

Nov. 15, 1955.

Sun Oil Company,
3101 Talleyrand Ave. at 21st Street,
Jacksonville 1, Florida.

GENTLEMEN:

We are giving 30 days' notice as per the terms of our contract reading as follows: that either Company or Lessee [fol. 520] may terminate this agreement as of the 17th day of January 1956, by giving thirty (30) days' written notice prior thereto.

Very truly yours Calvin R. Peery, Pres. Peery Industries, Inc.

CRP/h

Received Nov. 16, 1955, Sun Oil Co., Jacksonville, Fla.

BEFORE FEDERAL TRADE COMMISSION

COMMISSION EXHIBIT No. 17

Date 2-4-57

Jesse P. McClung
4724 Sunderland Rd.
Jacksonville, Fla.

Jan. 10th, 1956.

Sun Oil Company,
P. O. Box 147,
Jacksonville, Fla.

This is notice of termination of Real Estate Lease #603-0526-03 on Drive in Service Station at S. W. E. Main and 35th Street (4320 Main Street) and also termination of Dealers Agreement #603-0526-03, Both dated August 11th 1955, On February 27th 1956.

Very truly yours, Jesse P. McClung.

Received Jan 13, 1956, Sun Oil Co., Jacksonville, Fla.

[fol. 521] BEFORE FEDERAL TRADE COMMISSION

COMMISSION EXHIBIT No. 18

Date 2-4-57

6706 Main Street
Jacksonville, Florida

June 28, 1956.

Sun Oil Company,
P. O. Box 148,
Jacksonville, Florida.

GENTLEMEN:

You are hereby notified according to the terms and provisions of the contract dated June 29, 1954, that lessee, Bill Crabtree, wishes to terminate this lease by giving 30 days written notice per real estate lease contract No. 603-0040-02.

You are hereby requested to furnish replacement dealer as of August 1, 1956.

Yours very truly, Bill Crabtree.

BC/nt

Received Jun 29, 1956, Sun Oil Co., Jacksonville, Fla.

BEFORE FEDERAL TRADE COMMISSION

COMMISSION EXHIBIT No. 19

Date 2-4-57

January 20, 1956.

To Whom It May Concern:

Please accept my release of contract from Sunoco Service Station effective February 21, 1956.

[fols. 522-533] I have enjoyed very much being connected with your company for the past year.

Thank you for the cooperation you have given me.

Sincerely, Gilbert V. McLean.

Received Jan. 23, 1956, Sun Oil Co., Jacksonville, Fla.

CLERK'S NOTE RE EXHIBITS OMITTED

Commission's Exhibit 20—Form for Exhibits Sequence;

Commission's Exhibit 21 A-B—Form of Exhibits-Sequence;

Omitted from the printed record pursuant to designations of counsel as to printing record, copied at Pages 1 & 12.

• • • • • • •

[fol. 534-535] BEFORE FEDERAL TRADE COMMISSION

COMMISSION EXHIBT NO. 23.

Date 2/5/57.

Price Survey
Jacksonville, Fla.

April 11, 1956, 9:00 A. M.

	19.9	20.9	28.9	29.9	30.1	30.9
American				1	2	7
Atlantic		3		1	1	3
Cities Service				1	3	
Gulf				3	8	
Phillips					5	2
Pure		4			2	3
Richfield						1
Shell		9		3		
Sinclair				2	4	2
Standard					12	3
Sun				14		
Texas					3	5

Summary

Sun				14		
Majors		16		11	40	25
Independents	2		18			

Tankwagon—25 (incl. tax.)

[fol. 536] CLERK'S NOTE RE PAPERS OMITTED

Commission's Exhibit 25—Lists Showing Gas, Oil, Labor, etc.;

Commission's Exhibit 25-B—Form for Exhibits Sequence;

Omitted from the printed record pursuant to designations of counsel as to printing record, copied at Pages 1 & 12.

• • • • • • •

BEFORE FEDERAL TRADE COMMISSION

COMMISSION EXHIBIT No. 26.

Date 2-6-57.

Contract No. 603-0023-04

Date December 27, 1955.

Sun Oil Company,
3101 Talleyrand Ave.,
Jacksonville, Florida.

Gentlemen:

Please be advised that I am confronted with a depressed retail gasoline price situation which has affected my business. The following postings are now in effect at service station locations that I consider to be in competition with me:

[fol. 537] Competitive Dealer's Name and Address—Supertest, 19th & Pearl Sts., Jacksonville, Fla.

Brand Handled—Supertest.

Distance from my Station—Cross Street.

Posted Price Excluding All Taxes—15.9¢.

Effective Date, If Known—10:00 A. M. Dec. 27, 1955.

In order to meet this competition, it will be necessary for me to sell Blue Sunoco gasoline at a retail service station price that is 1.8c per gallon above the posted dealer tank-wagon price at which I now purchase same under my Dealer's Agreement.

Therefore, I am requesting assistance from you to help me in meeting these competitive conditions.

Very truly yours, Gilbert V. McLean.

I have checked the competitive price postings shown above, and find them to be correct.

(Illegible), Salesman.

Commission's Exhibit 27—List Showing Daily Totals and Averages; Omitted from the printed record pursuant to designations of counsel as to printing record, copied at Pages 1 & 12.

• • • • • • •

This advertisement appeared in the Florida Times-Union
Jacksonville on August 26 1955 (Friday)

GRAND

FRIDAY, 26th and SATURDAY, 27

SUPER-TEST

Regular First Grade
87½ Octane Gas

FREE
ICE CREAM AND
BALLOONS FOR CHILDREN

21 9/10
PER GALLON
Tax Inc.

★ **NO BETTER GAS AT ANY PRICE** ★

FRIDAY, 26th and SATURDAY, 27th

SUPER-TEST

Regular First Grade
87½ Octane Gas

21 9/10 PER GALLON Tax Inc.

FREE
ICE CREAM AND
BALLOONS FOR CHILDREN

★ NO BETTER GAS AT ANY PRICE ★

SUPER-TEST SERVICE STATION

2020 PEARL ST.--CORNER OF PEARL and 19th

OPEN 5 A.M. TO 12 P.M. DAILY

706

This advertisement appeared in the Florida Times-Union
Jacksonville on Saturday, December 3, 1955

FEDERAL TRADE COMMISSION
DOCKET NO.
IN THE MATTER OF

SPECIAL SALE

ONE DAY ONLY -- SATURDAY

DECEMBER 3rd

SUPER-TEST

REGULAR FIRST GRADE
87½ OCTANE GAS

9/10
Per
Gal.

...mps with
... of each gal-
... of gas and quart of
oil. Redeemable on
prizes up to 100 gal-
lons regular gas, or
$20.00 in cash.

★ NO BETTER GAS AT ANY PRICE ★

SUPER-TEST SERVICE STATION
Corner Pearl and 10th Streets

FEDERAL TRADE COMMISSION
DOCKET NO. [illegible]
IN THE MATTER OF [illegible]
FILED [illegible]
WITNESS [illegible]
SUPER REPORTING CO., Official Reporters
BY [illegible]

[fol. 540] BEFORE FEDERAL TRADE COMMISSION

RESPONDENT'S EXHIBIT 3

Date 2-5-57

Sun Oil Company,
P.O. Box 1148,
Jacksonville, Fla.

GENTLEMEN:

As a convenience to me, and if agreable to the Sun Oil Company, you are hereby authorized to add on all invoices for deliveries of Blue Sunoco to my station a sum of one-half cent per gallon, to be applied by you to my Accounts Receivable owed to the Sun Oil Company.

I give you the right, at any time you desire, to cancel this arrangement upon notice to me,

This is to be effective 12-5-55.

Yours very truly, Jesse P. McClung.

H. C. Harper, Witness.

BEFORE FEDERAL TRADE COMMISSION

RESPONDENT'S EXHIBIT NO. R-4

Date 2-5-57

Jacksonville

(April 4, 1955—9:00 A.M.)

	21 9	22 9	27 9	28 5	29 4	29 5	29 9	30 4	30 9
American		4					1		
Atlantic	2	10							
Gulf		13							
Orange State	1	6							

[fol. 541]

Philips	2	6							
Pure		9							
Shell		16			2				
Sinclair		6							
Standard		5			3	1	3		1
Texas	4	8						1	
Sun Oil		28							
Independents	16		1	1					

Summary

Majors	9	111			5	1	3	1	1
Sun			28						
Independents	16		1	1					

BEFORE FEDERAL TRADE COMMISSION

RESPONDENT'S EXHIBIT 5

Exhibits—Sequence

Docket No. 6641

☐ Marked for identification only.
☐ Withdrawn.
☐ Stricken.
☐ Excluded.
☐ .....
☐ .....

2-2

[*] Physical Exhibit; file symbol 6641-1

Description:

Map—Showing traffic flow—

[fol. 542] BEFORE FEDERAL TRADE COMMISSION

RESPONDENT'S EXHIBIT NO. 6

A Comparison of Retail Sale

1938 vs. 1956

(Excludes Comm'l. & W. O.

Total U.S.A. (Incls. S.E.)	1938	1956	% of Change
Blue Sunoco	574,654,299	1,710,477,699	+197 7
No. of Retail Accts.	9,051(1)	6,984(2)	−22 8
Avg. Mo. Gal. Acct.	5,291	20,409	+285 7
Southeastern Region			
Blue Sunoco	14,043,383	61,898,416	+340 8
No. of Retail Accts.	237(1)	269(2)	+ 13 5
Avg. Mo. Gal. Acct.	4,558	19,175	+320 7

Note 1: As of 10 38
Note 2: As of 12 31 56

Breakdown of Accounts by Classification

	U.S.A.			Southeastern Region		
	1938*	1955	1956	1938*	1955	1956
L. & O.	11 5%	43 6	47 4	71 0%	75 5	78 6
Option	( )	6 2	6 1	( )	6 3	7 3
Car Dealer	(88 5)	6 5	5 9	(19 0)	3 3	2 5
Other	( )	43 7	40 6	( )	11 9	11 6
Total	100 0%	100 0%	100 0%	100 0%	100 0%	100 0%

(*) 1938 Percentages are approximate based upon available records.

Market Research 1 22 57

[fol. 543] BEFORE FEDERAL TRADE COMMISSION

RESPONDENT'S EXHIBIT NO. 7

Date 5-14-57

Various Marketing Areas

A Summary of Price Survey Information Comparing Retail Price Postings For Regular Grade

Area	Date	Prevailing Non-Major Price	% Non-Majors at This Prevailing Price	% of Major Dealers Within 1¢	% of Sun Dealers Within 1¢
Philadelphia (69th St.)	1/ 8/54	23 9	67%	47%	72%
E. Hartford	3/ 1/56	22 9	100%	56%	93%
Hartford (Berks Tpk.)	3/ 1/56	22 9	100%	82%	100%
Cleveland	3/20/55	25 0	56%	95%	93%
Toledo	1/20/55	24 8 24 9	88%	94%	86%

BEFORE FEDERAL TRADE COMMISSION

RESPONDENT'S EXHIBIT NO. 8

Date 5-14-57

Florida Markets

A Summary Of Price Survey Information Comparing Retail Price Postings For Regular Grades

Area	Date	Prevailing Non-Major Price	% Non-Majors At This Prevailing Price	% Majors Dealers Within 1¢	% Sun Dealers Within 1¢
Miami	5/28/53	22 9	76%	64%	65%
Lakeland	11/19/54	27 9	100	85	100
Plant City	11/19/54	28 9	100	73	100
[fols. 544-648]					
Bradenton	11/29/54	27 9	100	92	75
Jacksonville	1/25/55	28 9	87	69	100
Lakeland	1/25/55	27 9	100	68	100
Plant City	1/25/55	28 9	100	70	100
Bradenton	1/27/55	27 9	50	95	100
Jacksonville	4/ 4/55	21 9	89	85	100

RESPONDENT'S EXHIBIT 10

FEDERAL TRADE COMMISSION
DOCKET NO. 6611 RESPONDENT'S EXHIBIT NO. 10
IN THE MATTER OF Sun Oil Co.
DATE July 7 WITNESS C. Lewis
REPORTING CO. Official Reporter

EXHIBIT NO. R-10

advertisement which appeared in The

lisn to

SPECIAL PRICE
SUPER-TEST
REGULAR FIRST GRADE 87½ OCTANE GAS
23 9/10¢
PER GALLON

SPECIAL PRICE
SUPER-TEST
REGULAR FIRST GRADE 87½ OCTANE GAS
23 9/10¢
PER GALLON
FREE Savings stamps with purchase of each gal. of gas & quart of oil. Redeemable on prizes up to 100 gals. gas or $20 in cash.
SUPER-TEST SERVICE STATION
CORNER PEARL AND 19th STREETS

THIS ADVERTISEMENT APPEARED IN THE FLORIDA TIMES-UNION, JACKSONVILLE ON SATURDAY, FEBRUARY 4; SUNDAY, FEBRUARY 5; AND SUNDAY, FEBRUARY 12, 1956

ALL THREE ADS WERE 9-3/4" X 14-1/2"

GASOLINE SPECIAL

UNTIL FURTHER NOTICE
REGULAR
FIRST GRADE
87½ OCTANE GAS

23 9/10¢ PER GALLON

MOTOR OIL 15¢ PER QUART

KEROSENE 14 9-10¢ PER GALLON

FREE SAVINGS STAMP WITH PURCHASE OF EACH GALLON OF GAS AND QUART OF OIL. REDEEMABLE ON PRIZES UP TO 100 GALLONS REGULAR GAS OR $20.00 IN CASH

Super-Test Service Station

CORNER PEARL AND 19th STREETS

OPEN 6:00 A.M. TO 11:00 P.M. DAILY

[fol. 660] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—December 2, 1959

No. 17658

SUN OIL COMPANY

versus

FEDERAL TRADE COMMISSION

On this day this cause was called, and after argument by Leonard J. Emmerglick, Esquire, for Petitioner, and Francis C. Mayer, Esquire, Attorney, Federal Trade Commission, for respondent, was submitted to the Court.

[fol. 661] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17658

SUN OIL COMPANY, Petitioner,

versus

FEDERAL TRADE COMMISSION, Respondent

Petition to Review Order of the Federal Trade Commission

OPINION—July 24, 1961

Before JONES, BROWN, and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: This controversy between Sun Oil Company, petitioner, and the Federal Trade Commission was generated by a price battle between two filling stations. The issues relate to an alleged secondary-line price discrimination violative of the Robinson-Patman Act and the Federal Trade Commission Act. The key question is whether the defense of meeting competition in good faith is available to a supplier of gasoline when the supplier reduces the wholesale price of its gasoline to one of its filling

stations engaged in a price battle at the consumer level [fol. 662] with a station owned and operated by a competing supplier. We hold for the petitioner.

Sun, a major oil company, refines, sells, and distributes gasoline throughout the United States. It sells only one grade, Blue Sunoco. In 1955 Gilbert McLean, one of Sun's thirty-eight retail dealers in Jacksonville, Florida, operated a filling station on the corner of 19th and Pearl streets in Jacksonville.[1] McLean was an independent contractor[2] but, like virtually all filling station operators, he sold gasoline purchased from only one supplier. He bought gasoline from Sun Oil Company at 24.1 cents a gallon and sold it at 28.9 cents a gallon, then the prevailing price in the Jacksonville area for gasoline sold under a major supplier's brand. Late in June 1955 Super Test Oil Company, a "non-

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[1] Sun divided Jacksonville into three sales territories. McLean and seven other dealers were located in the territory consisting roughly of the north one-third of Duval County. The examiner found that the pattern of traffic flow in this sales territory was such that motorists traveling from northern and northwestern Duval County to the downtown Jacksonville area had ready access to all of these stations.

[2] "Service stations today may be divided into five groups and the number in each roughly estimated as follows: (1) over 3,000 owned by suppliers and run by salaried managers; (2) about 8,000 of the new and rapidly growing 'commission-type' stations run as independent businesses except that they buy their gasoline on consignment, thus giving the supplier control over prices; (3) some 90,000, more or less, which are leased by the supplier—usually a refiner, but often a jobber and occasionally the owner of a chain of stations—to the operator, subject to cancellation for unsatisfactory performance; (4) perhaps 15,000 or 20,000 leased by the dealer from a third party; and (5) the remaining 60,000 or so which are on land and premises owned by the dealer himself. Types (4) and (5) are the 'independent' or 'contract' stations whose operators merely buy their gasoline, and usually other products, on contract from their suppliers." Whitney, 1 Antitrust Policies—American Experience in Twenty Industries 125 (Twentieth Century Fund, N.Y. 1958).

[fol. 663] major"[3] competitor of Sun's, opened a filling station across the street from McLean's station and began selling Super Test "regular" gasoline at 26.9 cents a gallon, then the prevailing price in Jacksonville for off-brand gasoline. McLean testified that he was not hurt competitively as long as the differential between Sunoco and Super Test was two cents.[4] In August the Super Test station commenced a series of price cuts which were advertised on curb signs in front of the station and also in the newspapers. August 27 Super Test dropped its posted price to 21.9 cents a gallon and August 28 dropped its price to 20.9 cents a gallon. Then and later, whenever Super Test [fol. 664] cut its prices McLean's sales declined substan-

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[3] The line between a "major" and a "non-major" oil company or "independent" is not well-defined. A major oil company is usually integrated in that it operates on the four functional levels of production, transportation, refining, and marketing. Generally, a non-major does not own its refinery or if it does, the refinery is usually small. The non-major usually owns and operates its filling station. The off-brand gasoline a non-major sells has a lower octane rating than a name-brand gasoline. Super Test had an octane rating of 87.5 as against Sunoco's rating, in 1955, of 92.5. There are about twenty vertically-integrated but not self-contained majors.

[4] "Private brands generally come to rest at a differential around 2 cents at retail below major brands." de Chazeau and Kahn, Integration and Competition in the Petroleum Industry 466 (Yale U. Press, 1959). In a case study of a price war in Philadelphia the author states, "The Sun management believed that a branded gasoline could effectively compete with a non-branded gasoline which sold for only one to two cents less." Comment, Competition in Gasoline Retailing: A Price War, 101 U. of Pa. L. Rev. 643, 645 (1953). In the instant case the Sun official in charge of market research testified that it was not unusual to find markets where the differential is only one cent; that in a sub-normal market, such as a price war, the pattern has been for the majors to post prices within one cent of the non-majors. The examiner regarded this as evidence of predatory pricing to whip non-majors into line; Sun insists that the dealer posts whatever price *he* chooses,

tially.[5] On a number of occasions, after reducing prices and gaining customers at McLean's expense, Super Test reestablished the customary two-cent price differential between its gas and Sunoco. On at least one occasion Super Test maintained its low price for a week.

McLean and Super Test competed for gallonage with McLean always the loser. He was a sitting duck. Super

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and that in a price war a dealer tries to protect himself by posting a price with a one cent differential.

The determination of a sound differential is made more difficult when, as in the instant case, the non-major gives trading stamps. Sun officials regard such a practice as equivalent to a further reduction of one cent in the price of gasoline.

[5] The monthly gallonage was:

	McLean	Super Test Regular	Super Test Premium
June, 1955	7,145	.....	.....
July, 1955	7,466	5,047	1,329
August, 1955	6,735	15,300	4,292
September, 1955	6,409	10,694	2,693
October, 1955	6,495	10,925	2,648
November, 1955	5,946	11,066	2,398
December, 1955	8,368	18,906	3,954
January, 1956	32,115	61,672	7,890
February, 1956	.....	67,156	8,520

McLean's December and January figures reflect the increase in sales after Sun's allowance of 1.7 cents on December 27, 1955. McLean's daily sales in February 1956, until he went out of business February 18, averaged about the same as January sales.

On August 26, 1955, when Super Test's regular gas was posted at 26.9, its station sold 127 gallons plus 21 gallons from the truck pump; on August 27, when the price dropped to 21.9, the station sold 3,583 gallons plus 263 from the truck pump, and 1324 of ethyl (at 23.9). On August 28, when the price was cut to 20.9 for the regular, Super Test sold 4931 gallons plus 278 from the truck pumps, and 1611 gallons of ethyl. On August 29, when the Super Test price went up again to 26.9 and 28.9, the station sold 408 gallons of the regular plus 38 from the truck pump, and 137 gallons of ethyl.

Test, a vertically-integrated company[6] operating its own [fol. 665] filling stations, could fix any retail price it pleased; McLean's price to the public was dependent on Sun's price to him. The Examiner found that McLean

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[6] "All of the largest companies and many of the smaller ones are integrated vertically. Though the physical flow of oil from well to user may be almost continuous, the sequence of operations traditionally falls into a number of broad categories . . . Vertical integration occurs when the activities of a single company span two or more of these stages." de Chazeau & Kahn, Integration and Competition in the Petroleum Industry, p. 19 (Yale U. Press, 1959). Vertical "integration appears in many contexts"; it is "the combination under single ownership of successive stages in a particular cycle of production." Rostow, Entry into the Oil Refining Business; Vertical Integration, 61 Yale L. J. 856, 860, 878 (1952). For a comprehensive study of integration in the petroleum industry, in addition to de Chazeau and Kahn, see McLean and Haigh, The Growth of Integrated Oil Companies (Boston, Harvard Business School, 1954).

"During the 1920's the major oil companies expanded their direct operation of service stations; but retail price cutting after 1929 began to reveal weaknesses in this policy. Independent stations took business away from company stations because they could cut prices on shorter notice, with less risk of ill will, and without violating the Clayton Act or one-price laws in a number of states. Between 1933 and 1934 the number of stations owned by eighteen majors was reduced from 125,327 to 98,246, and by 1935 it was only 75,547. The new factor which became effective in 1935 was Iowa's severe tax on chain stores, including stations. Standard of Indiana at once leased out to their operators all its stations in the state, and this 'Iowa plan' quickly spread to other refiners and other territories. Besides escaping the chain store tax, which seven states had adopted at the end of 1939, the refiners were glad to be relieved of responsibility for service station employees, who were now being organized into unions and covered by social security and wage and hour legislation.

"The number of refiner-operated stations continued to

made it clear to Sun that unless something could be done to meet the Super Test competition he would be forced out of business. In the four months following Super Test's August "Grand Opening Special" McLean repeatedly asked Sun to reduce its wholesale tank-wagon price to him to a level that would allow Sunoco to compete with Super Test. Sun carefully considered the situation, but for four months gave no price allowance to McLean.

[fol. 666] The week-end of December 3, 1955 Super Test dropped its price to 21.9 cents a gallon. A few days later the price went up again but after a short lull, with Sunoco still at 28.9 cents a gallon and Super Test at 26.9 cents a gallon, Super Test dropped its price to 24.9 cents a gallon. This was the last straw. McLean told Sun's regional manager that he was going out of business. The manager reported to his home office that the situation was "desperate." McLean informed the manager that to meet the competition he would have to post a price of 25.9 cents a gallon, but he could not afford to do so unless Sun gave him some relief. He followed this with a request by letter for assistance that would enable him to sell at 1.8 cents a gallon above the posted dealer tank-wagon price of 24.1 cents a gallon.[7] December 27, 1955, Sun gave a discount to McLean of 1.7

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decline, amounting to only about 3,000 [less than 2%] in 1956. Although some majors still keep a core of salaried dealers, most of them have retained only a few selected locations to use as models or experimental and training plants; and for the profit of their concentrated, high-volume sales." Whitney, 1 Antitrust Policies 125 (1958). Here, Sun's integration stopped short of retailing through company-owned stations.

[7] The letter, dated December 27, 1955, read, in accordance with a company form: "Please be advised that I am confronted with a depressed retail gasoline price situation which has affected my business . . . In order to meet this competition, it will be necessary for me to sell Blue Sunoco gasoline at a retail service station price that is 1.8 cents per gallon above the posted dealer tankwagon price at which I now purchase same under my Dealer's Agreement.

Therefore, I am requesting assistance from you to help me in meeting these competitive conditions."

cents a gallon.[8] Sun reached this decision after a study of gallonage records of its Jacksonville dealers and a report from its regional manager, familiar with the local situation, led it to conclude that only McLean was affected adversely by Super Test's price-cuts and a price allowance could be made to McLean to put Sunoco on a com- [fol. 667] petitive level with Super Test at 19th and Pearl streets without adversely affecting any other Sun dealer in Jacksonville. McLean cut his price three cents, to 25.9 cents, thereby absorbing 1.3 cents of the cut and reducing his normal gross profit from 4.8 cents to 3.5 cents. Sun officials and McLean testified that there was no agreement or understanding to fix his retail price. The Examiner found, however, that there was such an agreement. The next day or one day thereafter Super Test reduced its price to 23.9 cents, reestablishing the 2-cent differential. McLean maintained his price at 25.9 cents and kept it there until he went out of business. Shortly after Sun reduced its tank-wagon price to McLean, other dealers in the Jacksonville area complained about not being given the same allowance.[9] Then, February 16, 1956, what had been a skirmish on the corner of 19th and Pearl became a full-scale price war in the Jacksonville area. February 16 Super Test lowered its price to 22.9 cents for its regular gasoline and 25.9 cents for ethyl. Then, after several major suppliers reduced their tank-wagon price, Sun dropped its tank-wagon price to all of its dealers in the area.

Sun's price allowance to McLean on December 27, 1955, came too late to help him. February 18, 1956, he went out

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[8] Sun's policy is to make certain that an operator grosses at least 3.5 cents a gallon. Sun considers this the minimum margin on which a dealer can exist. 3.5 is 1.3 cents less than McLean's usual profit of 4.8 cents. Since McLean elected to reduce his posted price to 25.9 cents a gallon, a drop of 3 cents, it was requisite that the company allow 1.7 cents in order for him to gross 3.5 cents.

[9] Four of the seven other Sun dealers in the same sales territory as McLean testified. The Examiner found that these dealers were in substantial competition with McLean and that they were competitively injured by the price allowance granted McLean.

of business. It was just as well; February 28, Super Test cut it regular gasoline to 19.9 cents and its ethyl to 22.9 cents.

September 28 1956, the Federal Trade Commission filed [fol. 668] a complaint aaginst Sun charging it with having violated Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act,[10] by selling gasoline to McLean

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[10] 49 Stat. 1526 (1936), 15 U. S. C. §§ 13-13b, 21a, Section 2 (a) provides: "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or any other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ."

Section 2 (b) provides: "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided*, however, That nothing contained [herein] shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . to any purchaser . . . was made in good faith to meet an equally low price of a competitor. . . ."

at a lower price than Sun charged other retail dealers in the same market area. In defense, Sun asserted that the allowance to McLean was a good faith price reduction to meet competition, as permitted under Section 2 (b) of the Robinson-Patman Act. The complaint charged also that Sun violated Section 5 of the Federal Trade Commission Act by conspiring with McLean to fix the retail price of Sunoco at McLean's Station.[11] Sun denied this charge. The com- [fol. 669] mission, adopting in full the Hearing Examiner's findings and conclusions, issued a broad order against Sun, directing it to cease and desist from discriminating in prices; the order applies not only to the sale of gasoline but also to the sale or distribution of any Sun products. On Sun's petition to review and set aside the Commission's cease and desist order, we grant review and set aside the order.

I

The Commission contends that the defense of meeting competition is available to a seller only to meet direct competition for the business of his customer; that Sun could reduce its price to McLean only if Super Test offered gasoline to McLean at prices cheaper than Sunoco. Here, however, so the Commission argues, the seller granted a price deduction to a favored dealer in order to help *that* dealer meet his retail competition.[12] Respect for a federal

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[11] 38 Stat. 719 (1914) as amended by 52 Stat. 111 (1938), 15 U. S. C. A. § 45.

[12] The hearing examiner stated merely that "the proviso in Section 2 (b) has reference to the good faith meeting of competition of the seller, and not the competition of the buyer as in this case." The Commission opinion simply states: "The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2 (b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition. As pointed out by the hearing examiner, this agreement goes beyond

agency's unquestioned expertise does not require the Court to abdicate its judicial responsibility of construing the statute in the factual setting, strongly as counsel for the Commission argues that the weight to be given the facts and [fol. 670] inferences is for the Commission.[13] We consider the Commission's construction of the Act unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act.

Section 2 (a) of the Robinson-Patman Act requires a seller to charge uniform prices to competing purchasers; proof of a price discrimination establishes a prima facie violation of Section 2 (a). "[A] price discrimination within the meaning of that provision is merely a price difference." *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 1960, 363 U. S. 536, 80 S. Ct. 1267, 4 L. Ed. 2d 1385. However, as the Seventh Circuit pointed out in Anheuser-Busch on remand, the "Supreme Court, at 553, disclaimed any flat prohibition of price differentials, recognizing that price differentials constitute but one element of a section 2 (a) violation". *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 1961, F. 2d . Other parts of the statute allow price reductions which meet established criteria; the Act clearly "places emphasis on individual competitive situations".[14]

Section 2 (b), on which Sun relies, allows a seller, in an individual competitive situation, to rebut a prima facie violation of Section 2 (a) by showing this his "lower price . . . was made in good faith to meet an equally low price [fol. 671] of a competitor". This proviso creates a substantive defense or "justification" that overrides the impor-

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the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer."

[13] See fotnote 42. See Comment, The New Federal Trade Commisison and the Enforcement of the Antitrust Law, 65 Yale L. J. 34, 81-85 (1955). See also Schwartz, Legal Restriction of Competition in the Regulation Industries: An Abdication of Judicial Responsibility, 67 Harv. L. R. 436, 471-475 (1954).

[14] Federal Trade Commission v. Staley, 1945, 324 U. S. 746, 753, 65 S. Ct. 971, 89 L. Ed. 1338.

tance of any competitive injury and is absolute in nature.[15] The Section 2 (b) defense raises a question of fact in each case as to whether the competition justifies the discrimination.[16]

In holding the defense of meeting competition inapplicable, the Examiner and the Commission relied on *Enterprise Industries, Inc* v. *Texas Co., D.C. Conn.*, 1955, 136 F. Supp. 421; rev'd on other grounds, 2 Cir., 1957, 240 F. 2d 457; cert. den., 1957, 353 U. S. 965, 77 S. Ct. 1048, 1 L. Ed. 2d 915. There is no other reported case directly in point.[17]

In Enterprise the plaintiff operated a Texaco station selling gasoline purchased only from the defendant, Texas Company. The plaintiff's station, near Hartford, Connecticut, on a well-traveled interstate highway, competed with other stations on the highway for the business of transient motorists, and it also competed for local business with nine stations off the highway selling Texaco. Hartford gas stations were in a price war. Texas Company, under the spur [fol. 672] of declining sales, made price allowances to both local and highway Texaco dealers in the gas war area on condition that they match (but not undercut) the prices of

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[15] Standard Oil Co. v. Federal Trade Commission, 1951, 324 U. S. 746, 71 S. Ct. 240, 95 L. Ed. 239.

[16] "Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it 'shall prevent' discriminations in price 'made in good faith to meet competition.' The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess. pp. 6, 7; see also the statement of Representative Utterback, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418." Federal Trade Commission v. Staley Mfg. Co., 1945, 324 U. S. 747, 752, 65 S. Ct. 971, 89 L. Ed. 1338.

[17] The Commission filed complaints in two actions that are similar to the complaint filed against Sun. Both these matters are still pending before the Commission. The Pure Oil Co., F. T. C. Dkt. 6640 (1956); The Texas Co., F. T. C. Dkt. 6898 (1957).

their competitors selling rival brands. The amount of the allowance depended on the prevailing neighborhood price. The price in Hartford was lower than it was on the highway, so that Texas Company sold to its Hartford dealers at a lower price than it sold to the plaintiff. The plaintiff sued for treble damages for price discrimination under Section 2 (a). The district court rejected the meeting competition defense, holding that by granting a price differential between purchasers who competed with each other Texas Company violated Section 2 (a) of the Robinson-Patman Act.[18] The district court stated:

> "Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made avail-

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[18] In Enterprise the district court pointed out that the burden was on Texas Company to prove the price of its competing refiner. There was no evidence of such price and none that the Texas Company's prices were not *lower* than its competitors. Further, there was no evidence that the prices of the competitors were lawful prices. The defense of meeting competition failed on these grounds. The district court did not rule on whether a supplier was meeting *his* competition in giving an allowance to a dealer who also had competition to meet. That was not the case before it.

On appeal the Second Circuit did not reach the substantive issue, dismissing the case on the ground that the plaintiff had failed to prove the amount of its injuries. Nevertheless, Judge Hand, organ of the Court, seemed to take it for granted that the supplier's action was the natural and lawful response to a price raid from a competitor. He said:

> "It is not uncommon in the industry for a filling station to start what has come to be known as a 'gas war'; that is to cut the prevailing price of gasoline, which other competing stations must meet by a corresponding cut in order to keep up their sales; and that makes it important for the producing companies to reduce their prices to their own competing stations." (240 F. 2d 457, 458).

> [fol. 673] able to those other stations by a competing oil company. In view of the short term station and equipment leases in effect with some stations, perhaps it is a fiction to speak of price competition at the oil company sale to the station level. That is, the competitive level at which the justification is provided for defendant in the Act however. The Act does not go so far as to allow discriminatory price cutting to enable a buyer to meet price competition, but only to enable the seller to meet a lawful price of the seller's competitor." (136 F. Supp. 421)

The district court was fully aware of the unreality of its approach, as is evident from the court's admission that it is a "fiction to speak of price competition at the oil company sale to the station level"; a filling station operator carrying a brand-name gasoline does not buy from several competing oil companies.[19] Inherent in the court's con-

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[19] W. W. Wright, 35 years with Sun, Sales Manager and Vice President of Sun, testified: "I would say all gasoline is sold to the public through stations operating or handling one brand of gasoline."

"Although the Standard Stations and Richfield cases dealt primarily with exclusive dealing in gasoline, there is in fact little future in the attemp to have stations handle more than one brand. 'Split pump stations,' as they were called, were formerly quite common, but defects of the system caused most of them to disappear. As early as 1931 two surveys showed 85 and 95 per cent of motorists expressing themselves as opposed to it, primarily out of fear that the dealer would substitute the second brand for the desired one. Not only did dealers find that handling one brand required less investment and less bookkeeping, but six out of seven felt that it actually increased sales. As to suppliers, they naturally dislike operating through dealers whose lack of special enthusiasm for their own brand is obvious to the customer.

In bringing the Standard Stations suit, the Department of Justice probably had in mind elimination of exclusive dealing in motor oil and TBA as much as or more than in gasoline." 1 Whitney 126, op. cit.

clusion, and in the position of the Commission in this case, [fol. 674] is the notion that although a supplier's product competes with the products of other suppliers for the motorists' trade a supplier is not in competition at the consumer level—even with a supplier-retailer; or, if he is, the Act ignores it. Thus, if Super Test had attempted to increase its share of the market by offering its gasoline to McLean at a price under Sun's price, the Commission—so it says in regard to such an unusual situation—would have allowed Sun to meet the competition by reducing its prices to McLean. Yet Super Test accomplishes the same purpose by undercutting McLean, and the Commission gives its blessing to the practice. The Commission would have Sun sit and watch Super Test squeeze McLean out of business and take over Sunoco customers at 19th and Pearl. A result so extreme mocks the principle, "The heart of our economic policy long has been faith in the value of competition", "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor". *Standard Oil Co. v. FTC*, 340 U. S. 231, 248.

To our way of thinking, the court's approach in Enterprise, and the Commission's doctrinaire approach here are inconsistent with the view of gasoline marketing taken in the "Detroit" opinion, *Standard Oil Company* v. *FTC*, 1951, 340 U. S. 231, 71 S. Ct. 240, 95 L. Ed. 239.[20] Standard Oil [fol. 675] of Indiana, to meet a competitor's price, sold gasoline to four wholesalers, jobbers, in the Detroit area at a lower price than it charged its retail dealers. The

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[20] "The canons of construction applied by the Supreme Court in the 1951 'Detroit' opinion are the direct antithesis of those employed by the District Court in Enterprise." Steed, Antitrust Problems Under Price War Conditions, Southwestern Institute on Antitrust Laws, 77, 100 (1958). (It should be pointed out that Steed is an attorney for the Texas Company).

"The Enterprise view of the good faith defense is in sharp contrast with that expressed by the Supreme Court in Standard Oil Co. v. FTC." Note, The Good Faith Defense of the Robinson-Patman Act, 66 Yale L. J. 935, 938 (1957).

jobbers passed on this saving to their customers who were able to undercut retail dealers buying directly from Standard Oil. The Commission took the position that Section 2 (b) merely allowed rebuttal of a prima facie case, and was not a substantive justification of an otherwise unlawful price discrimination. The Supreme Court held that Section 2 (b) good faith defense was absolute even though a substantial lessening of competition might result, and remanded the case to allow Standard "to show that its lower price to each jobber was made in order to retain that jobber as a customer and in good faith to meet an equally low price offered by one or more of its competitors." 340 U. S. 231, 236. The case is distinguishable on the facts, but the Court was acutely aware of the interaction of competition at various levels and recognized the validity of the defense even though the price differential would have an injurious effect on competition among the supplier's dealers and the dealers' purchasers:

> "It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those [fol. 676] reductions had been met by the seller." 340 U. S. 231, 250.

The "actual core of the defense," the Supreme Court stated, "still consists of the provision that whenever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." 340 U. S. 231, 242. Here, there is no doubt that Super Test's prices threatened "to deprive" Sun of McLean as a customer. They did in fact deprive Sun of McLean as a customer. And they deprived Sun of sales, through McLean, to the motoring public. "Clearly, a seller's need for a lower price in response to a decrease in his sales is the same whether the decrease occurs because his purchasers switch to a price

cutting competitor or because [his purchasers] are unable to protect their share of the retail market from distributors of a rival product." [21]

In the instant case the Commission shows a proper solicitude for other Sun stations in McLean's sales territory. Sun denied that these stations suffered any substantial loss of business attributable to McLean. The Examiner found that four of these stations suffered a loss of trade, although they were located at distances of somewhat less than a mile to three and a half miles from 19th and Pearl streets and it would seem impossible to say whether they suffered a substantial loss of gallonage from Sun's price allowance to McLean or from Super Test's aggressive price [fol. 677] cutting. But if the good faith defense is to have meaning *when applied to a supplier in competition with a supplier-retailer*, it must be recognized that some dealers may suffer a diversion of business when the supplier lowers its price to meet competition. This result is consistent with the theory of the Robinson-Patman Act in the light of national policy as expressed in the Sherman Act. The two statutes must be reconciled—if possible.[22] National policy favors consumers and the competitive process. Consumers favor the benefits of competition—not the benefits of buying from particular merchants. Thus, the Attorney General's National Committee to Study the Antitrust Laws, emphasizes that the Robinson-Patman Act focuses on "the vigor of competition in the market rather than hardship to individual businessmen . . . Incidental hardships on individual businessmen in the normal course of commercial events can be checked by a price discrimination statute only at serious risk of stifling the competitive process it-

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[21] Note, The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 939, (1957). See also Casady & Jones, The Nature of Competition in Gasoline Distribution at the Retail Level 79-92, 122-38 (1951).

[22] "It is our duty to reconcile such interpretation [of the Robinson-Patman Act], except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." Automatic Canteen Co. v. FTC, 1953, 346 U. S. 61, 74, 73 S. Ct. 1017, 97 L. Ed. 454.

self."[23] Taking a coldly objective view of this case, one would have to say that, regardless of some injury to certain Sun dealers, Super Test's price-cutting and Sun's response of making an allowance to McLean benefitted consumers and the competitive process in at least two ways: by promoting competition at the retail level and by providing an opportunity for a major to break away from a uni- [fol. 678] form pricing system[24] characteristic of an oligopolistic[25] industry such as the oil industry.

For precedent, the Commission relies solely on Enterprise. Sun, aside from the Standard Oil decision, finds aid and comfort in *Balian Ice Cream Co.* v. *Arden Farms*, 9 Cir., 231 F. 2d 356, cert. den. 350 U. S. 991 and *American Cooperative Serum Association* v. *Anchor Serum Co.*, 7 Cir., 1946, 153 F. 2d 907, cert. den. 329 U. S. 721. Balian is distinguishable in that the supplier cut its price on ice cream products to all of its customers in the entire Los Angeles market area, and the Court found that there was no in-

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[23] Report of Attorney General's National Committee to Study Anti-Trust Laws, 164-165 (1955). See also Anheuser-Busch v. FTC, 1959, 265 F. 2d 677.

[24] It has been suggested that the "belief that Standard's price discrimination [in the Detroit Case, 340 U. S. 231] thus encouraged competition both on retail and supplier levels may well have been behind the Justice Department's open disagreement with the FTC." Comment, Price Discrimination in Gasoline Marketing, the Detroit Jobbers Case, 19 U. of Chi. L. Rev. 58, 63 (1951).

[25] Rostow and Sachs write: "In short, in the case of the oil industry the beginning of analysis from the point of view of the antitrust laws is the proposition that the major companies are *oligopsonists* in the crude purchasing market and *oligopolists* in the sale of refined products." Entry Into the Oil Business, 61 Yale L. J. 856, 893 (1952). "A structurally oligopolistic market is one in which the few largest sellers in the market have a share of the market sufficient to make it likely that they will recognize the interaction of their own behavior and their rivals' response in determining the values of the market variables." Kaysen and Turner, Antitrust Policy, An Economic and Legal Analysis 27 (1959).

jury to any of the customers.[26] In *American Cooperative* [fol. 679] *Serum Association* v. *Anchor Serum Co.* the Association sold directly to consumers through druggists who acted as warehousemen or agents; as a retailer the Association could meet the price of its competitors at the retail level.[27]

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[26] Balian was a treble damage action under the Robinson-Patman Act in which the plaintiff ice cream manufacturers in Los Angeles contended that they were injured when the defendant Arden Farms, a manufacturer and distributor, lowered its prices on ice cream products in the Los Angeles area only. The Court upheld the defense of meeting competition. A number of the ice cream manufacturing plants were "captive creameries" in that they were owned by large chains and manufactured ice cream only for their owners. Customers supplied by Arden were in competition with retail outlets supplied by the captive creameries. Arden lowered its prices to its customers, retail dealers, to enable them to meet competition at the consumer level. It is clear that the captive creameries did not offer to sell at lower prices to Arden's dealers. Arden, therefore, is in the same position as Sun in the instant case. The district court (104 F. Supp. 796, 802), as well as the Court of Appeals, did not restrict the defense of meeting competition to the single situation where a supplier's retail dealer is offered lower prices by another supplier. The Court said: "The customers of Arden in the respective area are not in competition with each other, and the products sold in each area are sold in competition with like products manufactured by others."

[27] There is an analogy between the druggists, through whom American Cooperative Serum Association sold, and filling station operators—if one looks through the independent contractor status of gasoline retail dealers. Such dealers are something less than independent merchants and something more than the supplier's employees. They cannot try Sunoco one day and Esso the next; they are inextricably associated with the gasoline they sell. In American Cooperative Serum the Court treated the druggists as "warehousemen" or "agents"; they actually received the serum on consignment.

According to the Commission, even without any judicial gloss Section 2 (b) is clear and unambiguous: "the plain wording of the proviso . . . has reference to the good faith meeting of competition of the seller, rather than that of the buyer". Sun agrees that the section is clear and unambiguous: it contains no such restrictive language as the Commission reads into it, and Sun was within the scope of the proviso in reducing its price to McLean "to meet an equally low price of a competitor", Super Test. These conflicting constructions illustrate again that the Robinson-Patman Act is not distinguished for its clarity of expression.[28] Here the language of Section 2(b) seems imprecise [fol. 680] enough to support either interpretation.[29] Turning to the legislative history of the Act for enlightenment, we find Delphic generalities but no evidence that Congress considered the specific question at issue. In the absence of

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[28] "The Robinson-Patman Ast has been called, among other things, 'one of the most tortuous' legislative pronouncements ever to go on the statute books'. [Dirlam and Kahn, Fair Competition, The Law and Economics of Anti-Trust Policy, 119 (1954)]. It has been dubbed 'complex and anomalous' [Markham, Report of the Attorney-General's Committee on Anti-Trust Laws, 70 Q. J. Econ. 211], 'prolix and perplexing' [Report of the Attorney General's Committee to Study Anti-Trust Laws, 172 (1955), and 'obscure' [id. at 175]. I am sure it has been called other things which have not been recorded and which could not be repeated here." Boles, Marketing and the Robinson-Patman Act, Southwestern Legal Foundation 1958 Institute on Anti-Trust Laws, 1. See also Automatic Canteen Co. v. Federal Trade Commission, 346 U. S. 61, 65, 73 S. Ct. 1017, 97 L. Ed 454.

[29] Considering the difficulty of defining "competitor," "injury to competition," and "meeting competition in good faith," the Robinson-Patman Act may have the virtue Savigny ascribed to Roman law: "the excellence of a Roman law lay in its being neither too plain nor too obscure, but expressed in a sort of middling obscurity. 'Auf einen schmalen Raume mittlemass'gen Dunkelheit." Quoted in Curtis, A Better Theory of Legal Interpretatin, 3 Vand. L. Rev. 407, 421 (1950).

aid from judicial precedents and legislative history, we are driven to determining whether Sun's construction of Section 2 (b) is more meaningful and more in harmony with the purposes of the Act than the Commission's construction. This determination requires us to weigh the disparate effects of the two constructions.

For an oil company marketing gasoline through filling stations owned or leased by the operators and competing with a supplier-retailer, the practical effect of adopting the Commission's view is to excise from the Act the defense of meeting competition.

If gasoline could be canned like tomatoes and stocked like bottled goods, and if gasoline suppliers competed with each other for the retail merchant's trade, the Commission's reading of Section 2 (b) would be more realistic and more reasonable than is here presented. But the nature [fol. 681] of gasoline, the necessity for its bulk merchandising, the responsibility of the refiner or supplier for advertising, the dependent relation of the supplier on its dealers and the dealers on a single supplier make it a "fiction", or something less substantial than a legal fiction, "to speak of price competition at the oil company sale to the station level".[30] An oil company's product competes with the products of other refiners or suppliers in the motorists' market—through dealer outlets.[31] And, no oil company can stay alive if it loses its dealers.

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[30] Enterprise Industries, Inc. v. The Texas Co., 136 F. Supp. 420, 421.

[31] "Most of the evidence seems clearly to demonstrate that a company offers discounts because its dealers are losing business to price-cutting competitors; since the major suppliers compete among themselves and with independents primarily *through* their dealers, the concessions are made in a very real sense in good faith to meet competition. Furthermore, there is little evidence—and certainly non so far in these cases [Enterprise and the instant case, then before the Commission]—that the discriminations complained of put a halt to price competition, or even threatened to do so. On the contrary, dual distribution and discriminatory price concessions seem to have contributed on balance to the intensity of price competition,

The gas station retailer is a rare bird among retail merchants. His business is built around pumps which can be used only for his supplier's gasoline.[32] Sun sells Sunoco in pumps that say "Sunoco". Its competitor at 19th and Pearl in Jacksonville, Super Test, sells its gas in pumps that say "Super Test". Sunoco gasoline flows unchanged from Sun through Sun pumps to motorists. Sun, not some small retailer, bears the primary responsibility for advertising and for puffing Sunoco against Super [fol. 682] Test and other gasolines even though the sales which are competitive take place at the consumer level. McLean's losing fight for survival, therefore, was a lost battle in a long war between Sunoco and Super Test gasoline and between Sun and Super Test, suppliers, each out to increase its share of the motorists' trade.

As Mr. Justice Jackson has pointed out: 'Retailers' storage capacity usually is limited and they are in no position to accumulate large stocks. They can take gas only when and as they can sell it".[33] The suppliers, therefore, must maintain gasoline stocks to meet the needs of the ultimate consumer—the motorist; and a service station, therefore, primarily is what the word indicates—a *service* station. In gasoline marketing the supplier simply cannot be cut off from the filling station operator and treated as if it competed only for the busines of filling stations; oil companies compete with each other for the consumer's busi- [fol. 683] ness.[34] The filling station operator is a conduit

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where their effects have been visible." Integration and Competition in the Petroleum Industry, DeChazeau and Kahn, 480, (1959).

[32] This practice does not violate Section 3 of the Clayton Act. FTC v. Sinclair Refining Co., 1923, 261 U. S. 463, 43 S. Ct. 450, 67 L. Ed. 746.

[33] Dissenting opinion, Standard Oil Co. v. U. S. A., 337 U. S. 293, 323.

[34] "The legislative history of the Robinson-Patman Act discloses that one of the major dissatisfactions with original Section 2 of the Clayton Act was the belief that it was confined to cases where the effect of a price discrimination was on competition among sellers. The Robinson-Patman Act modified a number of provisions of old Section 2, in-

between the supplier and the motoring public. As Mr. Justice Jackson observed:

> "But the retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. * * * The retail stations, whether

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cluding both the competitive effect and meeting competition clauses. The modified provisions are distributed between the newly created subsections (a) and (b).

There is no reason to suppose that when the the prohibition was amended to include discriminations having adverse effects upon buyers, the failure to express a corresponding change in the meeting competition defense was anything more than the type of inadvertence which is the hallmark of the statute. For it is clear that the defense was intended to be correlative with the offense. Nor has any reason of policy been suggested for creating an imbalance between the prohibition and the justification. If the occasion for meeting competition exists, the validity of the defense should not depend on the hierarchy in the scheme of distribution at which competition is met. A multi-tiered condemnation requires a multi-tiered defense." Steed, Antitrust Problems Under Price War Conditions, Southwestern Institute on Antitrust Laws, 77, 99 (1958). Wright, Vice-President and Sales Manager for Sun testified: "In this setup the dealer actually is a conduit between the supplier, enjoying the patronage of the motorist, and the motorist and in essence they become, the dealer and the supplier become, a team of which the supplier and not the dealer assumes the major responsibility for promoting and guiding competition within the area . . . Now, it is not the service station operator, due to the limited facilities available, who is able to supply the repeated demand for gasoline, but it is the supplier who assumes that responsibility. Service stations are just too small to permit more than a few days' supply of gasoline . . . We were competing with the station as a retailer of Super-Test gasoline for the business of the motorists residing or working near that location, 19th and Pearl, and who would find it convenient to stop at that station."

independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged."

The Commission centers its argument on the contention that Sun reduced its price to McLean "to favor a particular customer in order to help that favored customer meet his competition." It is true that McLean was in a direct competition with the Super Test station across the street. It is true that he was in distress. But there is nothing in the record to show that any Sun official beat his breast over the personal plight of *Gilbert v. McLean*. On the contrary, the record shows that Sun reduced its price to McLean—to help itself; to meet low prices that were in- [fol. 684] ducing motorists to buy Super Test instead of Sunoco gasoline. Keeping McLean in business at 19th and Pearl was keeping Sun in business at 19th and Pearl and preserving Sun's share of the market in the Jacksonville area.

An unfortunate result of narrowing the scope of Section 2 (b) is that it takes flexibility out of a defense that ought to be flexible and dependent on individual competitive situations. Here the Commission gives no consideration to the fact that Super Test was a supplier-retailer. The Commission's sole criterion is whether Sun's price to McLean is lower than Sun's price to other dealers. The result is doubly unfortunate when the price-cutting supplier is a vertically-integrated company. The natural effect of the Commission's holding will be to push already highly-integrated majors into combining direct retailing with their other operations—*to the detriment of non-majors, such as Super Test, as well as to the detriment of filling station operators.*

One of the purposes of the Robinson-Patman Act was to promote local ownership, protect the small, independent merchant, and reduce the trend toward monopoly.[35] Con-

[35] The Clayton Act was primarily intended to prevent predatory practices of large sellers whose selective price-cutting, often below cost, enabled them to kill off smaller competitors. The Robinson-Patman Act was in good part the outgrowth of the FTC's investigation of chain stores.

[fol. 685] gressman Patman stated that the bill was "designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves and the manufacturer from whom he buys, from exploitation by his chain competitor." 79 Con. Rec. 9078. "The primary remedial objective of the Robinson-Patman amendment of the Clayton Act, therefore, was the protection of the smaller independent merchants from injury to their competitive position resulting from discriminatory advantages extended by manufacturers and producers to mass distributors who were using their concentrated buyer power to demand and obtain price concessions and preferential allowances and services. Whereas Section 2 of the original Clayton Act was aimed at predatory practices of powerful sellers directed at elimination of *their* weaker competitors, the Robinson-Patman Act was designed to curb the predatory use of bargaining power by chain stores and other large buyers and to preserve the independence of the small merchant as a factor in his local community." Austin, Price Discrimination Under the Robinson-Patman Act, p. 11 (American Law Institute, 1959). Here, ironically, the

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The primary purpose of the Act was to prohibit quantity discounts by large sellers where there was no cost saving attributable to the quantity sales. FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935); S. Rep. No. 1502, 74th Cong., 2nd Sess. 4 (1946). See Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 5-11, 93-96 (Amer. L. Inst. 1959); Rowe, Evolution of the Robinson-Patman Act, 57 Col. L. Rev. 1059, 1061 (1957); Palamountain, The Politics of Distribution chap. VII (1955); Rowe, Price Discrimination, Competition and Confusion: Another look at Robinson-Patman Act, 60 Yale L. J. 923 (1951); Fielda, Food Distribution in the United States, 99 U. of Pa. L. Rev. 1051 (1951); Machlup, Characteristics and Types of Price Discrimination 397, 412 (1955); Dirlam & Kahn, Fair Competition 206 (1954). Authorities on the origin and legal impact of the Act are collected in footnotes 5 and 6 of Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 664 Yale L. J. 1, 2 (1959).

Federal Trade Commission, swept on inexorably by the logical necessities of its barren logic, finds itself in the [fol. 686] unnatural role of fostering vertical integration at the expense of the small, independent filling station retailer.[36]

The Commission's construction gives the vertically-integrated company a competitive advantage based on the legal effect the Commission attaches to integration of retailing operations rather than on such economic factors as efficiency of merchandising, of distribution or of performance. This is not the case of an aggressive retailer, such as a supermarket, having an established policy of doing a high volume business on a low margin, consistently emphasizing price over service. As the Commission sees it, without regard to the economics of merchandising gasoline, a supplier-retailer, large or small, may with impunity undercut the retail outlet of a competing supplier. The undercut supplier may not resort to defensive tactics such as price allowance to his established outlet that in part (here, 1.7 cents) protects his dealer and himself against sporadic predatory raids.

How may a supplier protect himself in such a case? First, as the Examiner, perhaps with tongue in cheek, suggested, Sun could change its system of distribution, integrate its retail outlets, and sell directly to motorists [fol. 687] through stations the company owns and oper-

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[36] "Moreover, 'by narrowing the scope of section 2 (b), the decision aggravates the effect of price wars on retailers who are forced to cut their prices to maintain their volume of sales. * * * [Such a decision's] sole effect is to prohibit suppliers from lowering their wholesale prices to help their retailers meet a competitor's price cut. While this may prevent retail prices from being driven as low as might otherwise occur, the full amount of these price cuts must now come out of the dealer's profit margin. And since the ability of the retail dealer to meet price cuts normally acts as a deterrent to aggressive price-cutting * * * [such a decision] may even tend to encourage such practices." Note, The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 941-942.

ates.[37] Second, as of course the Examiner did not suggest but implicit in the suggestion, is the alternative that Sun withhold help to a filling station in distress and put the entire burden on the individual dealer—an intolerable burden, for, as this case demonstrates, an individual retailer cannot survive a price war with a company that has integrated wholesale marketing and retailing. The retail dealer operating his own filling station works on such a thin margin that the slightest cut slices to the bone, and his resources are not large enough to enable him to hold out for the duration of any long drawn out price war. A large margin makes him an easy prey to an aggressive competitor. The effect of the Commission's holding, therefore, is to bury the small, independent filling station retailer—whether the supplier takes over the ownership and operation of all its stations or, putting the entire burden on the dealer, the supplier takes no action. This dilemma and its implications could not and did not escape the attention of the Examiner or the Commission. The Examiner made—and the Commission approved—the suggestion, one that is somewhat more than banal, that if Sun should chose not to meet competition from Super Test by operating its own stations, a course of action naturally repugnant to the Commission, Sun could meet "competition at [fol. 688] the dealer level by non-discriminatory reductions in price to all dealers". In other words, to avoid the dilemma and to meet competition on the corner of 19th

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[37] The examiner's opinion, adopted by the Commission, states:

> "It is true, of course, as respondent argues, that where one or some of its dealers are faced with ruinous price competition respondent must take some action or suffer the loss of such dealership and respondent's competition with its own competition, but of course this is not the law and cannot justify price discriminations injuring others. Respondent could, if it chose to, meet such competition at the dealer level by nondiscriminatory reductions in price to all dealers, or by operating its own stations and thus being in direct competition with other stations which reduce prices."

and Pearl streets in Jacksonville, Sun, perhaps ruinously, would have to reduce its price to all of its dealers in the United States.[38] Or, assuming that the suggestion means "all dealers" in Jacksonville—in context it is not so limited—and assuming also that such price reduction would not run afoul of Anheuser-Busch,[39] the Commission would have Sun enlarge the scale of the price war and risk a chain-reaction that might set off price wars throughout Florida and Southeast United States. In either case, other oil companies, majors and non-majors, would have to meet Sun's price-cuts thereby spreading price wars and subjecting the margins of filling station operators to further compression.

Sun's restraint in taking no defensive action for four months and in giving a discount only to McLean had at [fol. 689] least the merit of attempting to localize a disruptive price battle. Extension of similar discounts by other major suppliers and by Sun, on an area basis, promptly

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[38] The Supreme Court has said that the Robinson-Patman Act does not require a seller to choose "between ruinously cutting its price to all customers . . . or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." Standard Oil Co. v. FTC, 340 U. S. 231, 250 (1951).

"The characteristic unwillingness of large national sellers to experiment with price changes will certainly be intensified if any reduction must be made in all submarkets, and oligopolistic industries will therefore be deprived of an important source of price flexibility." Comment, Competitive Injury Under the Robinson-Patman Act, 74 Harv. L. Rev. 1597, 1603 (1961). See also Dean, Managerial Economics 458 (1951); Machlup, The Economics of Sellers Competition 465 (1952).

[39] As noted in the Comment, Competitive Injury Under the Robinson-Patman Act, 74 Harv. L. Rev. 1597, 1599, "The cease and desist order [in Anheuser-Busch] prohibiting reductions unless proportionately made in all markets, did not disturb the pre-existing patterns of geographic variation that had been characteristic of the company's price behavior."

resulted in a price war in the area.[40] But suppose that a supplier in Sun's situation should decide that an across-the-board tank-wagon price reduction to meet competition at one location is irrational, had business management, and more than likely to bring on a general price war. Then, if the Act must be construed as forbidding a supplier's making a price allowance to a retail outlet in distress—the effect is to freeze the price level of major brands of gasoline and to promote rigid resale price maintenance.[41]

Imprecise language in the Robinson-Patman Act, policy divergencies between that Act and the Sherman Act, and the interrelation of integration and competition in the petroleum industry make it difficult for the Commission and the reviewing court to apply Section 1 (b) with cer- [fol. 690] titude as to the correctness of its application to the issue for decision. The Commission itself has changed

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[40] The record shows that in March 1956 virtually all of the stations in Duval County sold gasoline at reduced prices. The gallonage for the county increased 28.5 per cent over the gallonage for January.

For a case study of a price war in Philadelphia that arose from a competitive situation similar to the situation in the present case and also involved Sun, see Note, Competition in Gasoline Retailing: A Price War, 101 U. of Pa. L. Rev. 647 (1953).

[41] A practice of tailoring tank-wagon prices to meet individual competitive situations tends to reduce the effectiveness of the resale-price-maintenance characteristics, such as they are, of a major's pricing policy. The Commission's holding has the opposite effect since it tends to make for uniformity and rigidity in resale prices. Cf. Adelman's thesis: "The Act inhibits competition in the name of protecting competition." Adelman, The Consistency of the Robinson-Patman Act, 6 Stanford L. Rev. 3 (1953). See also Edwards, Maintaining Competition 159-71 (1949); Resale Price Maintenance and the Anti-Trust Laws, 18 U. of Chi. L. Rev. 369 (1951); The Swinging Door—Or How to Obey One Anti-Trust Law by Violating Another, 59 Yale L. J. 158 (1949); The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 944 (1957).

sides on the issue.[42] We have reached the conclusion that in this case the Commission's construction of Section 2 (b): violates the policy of the Act that places emphasis on individual competitive situations; focuses on injury to particular competitors rather than on the health of the competitive process; conflicts with the purpose of the Act to protect the small retailer; fosters vertical integration of retailing operations, jeopardizing the future of the non-major as well as the independent filling station operator; discourages sound marketing in that it confers a competitive advantage on a supplier gaining trade by sporadic predatory low prices unrelated to economic factors, in the sense that a high-volume low-margin policy of a super-market is related to such economic factors as low-cost efficiency of operation and the maximization of over-all profit; denies the realities of the market place in refusing to accept the undeniable fact that a supplier of gasoline competes with a supplier-retailer at the consumer level through filling station operators; tends to spread rather than localize price wars; and makes it impossible, as a practical matter, for a supplier to defend one of its filling stations, fighting for survival, or even to defend itself against destructive price raids of a supplier-retailer. Section 2 (b) should not be [fol. 691] read so narrowly as to produce effects so out of line with national policy. These effects may be avoided, in keeping with the spirit of the law and within the letter of the law, by a broad and simple construction: under Section 2 (b) a supplier may be in competition with a supplier-retailer. Here, a supplier selling gasoline that is in competition with the gasoline of a supplier-retailer and

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[42] The position taken by the Commission in this case represents a shift in its views. Before 1956 the Commission held that price allowances such as Sun made to McLean enjoy the protection of the defense of meeting competition. See testimony of Gwynne, Chairman, FTC, before Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, "To Amend Section 2 of the Clayton Act" Hearings, 84th Cong. 2d Sess. (1956), p. 229-232; cf. ibid., p. 89-92. In 1956 the Senate Sub-Committee on Re-tailing, Distribution and Fair Trade endorsed views similar to those now held by the Commission. S. Rep. No. 2810, 84th Cong. 2d Sess. 20, 28-29 (1956).

marketing its gasoline through an independent filling station that is in direct competition with a filling station owned and operated by the supplier-retailer is in competition with that supplier-retailer and entitled to assert the defense of meeting competition in good faith.

II

The examiner held that even if Sun could assert the Section 2 (b) defense, Sun failed to satisfy the statutory requirements of the defense for two reasons. First, Sun's allowance to McLean was not to meet competition, but to undercut Super Test's price.[43] Second, Sun and McLean entered into an agreement to fix the resale price of Sunoco gasoline. Such price-fixing agreement destroys the good faith defense and violates Section 5 of the Federal Trade Commission Act.

A. The examiner's holding that Sun's allowance to McLean was to beat competition rests on the fact that the [fol. 692] allowance of 1.7 cents was to enable McLean to post a price of 25.9 cents a gallon for Sunoco, a price then only one cent above the price of Super Test. This holding is a complete reversal of the views the examiner expressed during the hearing.[44] The Commission did not discuss the

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[43] One of the anomalies created by the Robinson-Patman Act is the doctrine that the primary test of good faith is whether the seller's lower price was made for the purpose of beating competition; that in competing for business a seller may equal a competitor's price but not go below it. Moss, Inc. v. FTC, 2 Cir., 1945, 148 F. 2d 378; Porta Rican American Tobacco Co. v. American Tobacco Co., 2 Cir., 1929, 30 F. 2d 234.

[44] Near the end of the hearing, the examiner commented: "[The Commission said] nothing in the complaint about fixing a price or cutting the price to within one cent of the competition, . . . If you had an allegation that by fixing a price, by cutting the price or maintaining the price within one cent of the Super-Test price in order to drive Super-Test out of business or harm competition or unduly suppress competition, as you have in the Pure Oil case, then it would be entirely relevant to prove that, and it would first be necessary as a basis for that to prove that one cent

point in its opinion; it did, however, adopt the findings and conclusions of the examiner.

The examiner was right the first time. (1) There is evidence in the record supporting the contention that the usual price differential between a major's regular gasoline and a non-major's regular gasoline is two cents. The examiner found, however, and the record supports the finding, that: "There is also considerable evidence in the record that the price differential between the two is frequently one cent a gallon. Suffice it to say that there is not sufficient reliable, probative, and substantial evidence in the record to establisf what, if any specific amount, is the usual and customary difference between major and non-major regular brands of gasoline." This of course bears importantly on the question of Sun's good faith in meeting, not undercutting, Super Test. (2) In holding that Sun's allowance of 1.7 cents to permit a posted price of 25.9 cents was to beat [fol. 693] competition, the examiner relied on McLean's testimony that he was not hurt competitively by a two cents spread. But this conclusion assumes that Super Test had an established, relatively stable pricing charge of 24.9 cents. The record shows, however, that Super Test had a bouncing ball pricing policy. The price had dropped as low as 21.9 and 20.9 cents a gallon. October and November prices were fairly stable but from December 1 on it was beyond human knowledge to say what Super Test's price might be at any particular time and how long the price would stay put.[45] In response to a question from the examiner as to how he arrived at 25.9 cents, McLean testified that he

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would have had the effect, as you are attempting to do in the Pure Oil case. . . . On the [Commission's] theory anyone who cuts a price to compete is violating the law and we would have uniformity of price throughout the country, which is exactly what we do not want. . . . I do not think the one-cent differential has anything to do with the case."

[45] On December 1, 1955 Super Test regular gasoline was priced at 26.9 cents a gallon. December 4 it dropped to 21.9. December 5 it went back to 26.9. December 12 it was down again to 21.9. December 13 the price started at 26.9 then dropped to 21.9. December 17 it was again

thought it was "to keep the two cents differential". Shortly after December 27, when McLean cut his price, Super Test cut its price to 23.9 cents. Notwithstanding the unpredictable ups and downs in Super Test's prices in December, January, and February, McLean made no attempt to maintain a one cent differential or to ask Sun for any further allowance. February 16 Super Test cut its price to 22.9 cents. Two days later McLean went out of business. We point out, too, that in view of Super Test's practice of giving savings stamps, worth about one cent a gallon, the actual spread exceeded the apparent differential. It seems to us that in view of this nervous and erratic pattern of irregular prices, Sun's allowance of not quite two cents and McLean's choice of 25.9 cents were about as fair and reasonable a meeting of competition as anyone could expect. [fol. 694] (3) In reaching this conclusion, we have also considered, as evidence of good faith, Sun's restraint over a long period of provocation and Sun's diligence in attempting to collect and evaluate the facts before taking any defensive action.

B. The examiner concluded, again reversing the view he held during the hearings,[46] that Sun and McLean entered in a price-fixing agreement or understanding. Price-fixing is per se unlawful. *United States* v. *Socony Vacuum Oil Co.*, 1940, 310 U. S. 150, 223. We recognize that direct proof of such agreement is not necessary, and that the Commission is charged with fact-finding. But the difficulty of proving an "understanding" and the acceptability of circumstantial evidence as proof do not justify relaxing the requirement that substantial evidence must support the Com-

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26.9. December 27 it was 24.9. January 3, 1956, it dropped to 23.9. February 16 it went to 22.9 and February 28 to 19.9.

[46] The examiner stated that the argument of the Commission did not "make sense." He said: "[Y]ou then jump to the conclusion that they must have agreed to fix the price because the price was a one-cent differential, but that might just as well have been a unilateral decision on the part of McLean or a unilateral decision on the part of Sun, if they controlled the price, as you claim. That would not be any evidence of an agreement between Sun Oil and McLean."

mission's findings and conclusions. As we read the record as a whole, there is no substantial evidence to support the Commission's finding of a price-fixing agreement. McLean, testifying a year after he had been forced out of business, apparently not actuated by any love for Sun, unequivocally stated that he had no agreement or understanding with Sun as to his retail price.[47] Sun's regional manager and [fol. 695] sales manager, who handled the allowance to McLean, were subjected to rigorous cross-examination. They testified that Sun does not fix the retail price for its dealers, and did not have an agreement or understanding

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[47] McLean testified:

"Q. What kind of an understanding did you have with Sun Oil Company leading up to them giving you this price adjustment?

"A. Well, I think I had been after them to get that price adjustment and on that day—I was closed for one or two days—and that day the salesman came around, Mr. Harper, and he said—I was talking to him about it and he said if it continued, if they dropped again, Super Test dropped again, that they would try to do something about it.

"He stayed around, I guess, 30 minutes or an hour and then he went off and on that day they did drop their prices and they gave me an adjustment and I dropped mine.

"Q. Now, is that all—what were you required to do if anything to get the adjustment?

"A. To take a cut."

. . . . .

"Q. I will ask you this, then: Weren't you required to do something to obtain that?

"A. To obtain that price?

"Hearing Examiner Piper: Yes.

"A. No, I dropped my gas but I wasn't required—I didn't have no agreement with them as far as lowering my price or raising my price or anything. There was no agreement made.

"Q. Was there anything said to you about reducing your margin of profit?

"A. Yes my margin of profit was reduced."

with McLean as to his resale prices. He could post any price, and 25.9 was the price he selected. Two of the four Sun dealers allegedly injured did testify that McLean told them that he was "very dissatisfied with the arrangement", but they refused to state that he had told them that he had an agreement with Sun or that Sun required him to fix a price of 25.9 cents.

The inference of price-fixing is based, as the examiner phrased it, on McLean's "testimony that he was required to take a cut in prices ['and drop his retail price to 25.9'] . . . in order to secure the discount of 1.7 cents per gallon from [petitioner]". The record shows, however, that the arithmetic of the situation, not Sun, required a discount of [fol. 696] 1.7 cents and compelled McLean to take a cut of 1.7 cents, if he wished to post a price of 25.9 cents and still keep a bare subsistence margin of 3.5 cents above the tank-wagon price. That is what McLean was trying to say when he talked about being "required" to take a cut and having his margin of profit "reduced". He had no difficulty in making it clear that there was no agreement, no *quid pro quo*, and he saw no inconsistency in his testimony. When Sun finally lowered its tank-wagon price to McLean, it is fair to assume that Sun would not have done so, if McLean had intended maintaining his price of 28.9 cents a gallon. Such an arrangement would have given him a margin of 6.5 cents, clearly an unjustifiable preference over other Sun dealers.

This is a long way from a price-fixing agreement.

For the foregoing reasons, we set aside the Federal Trade Commission's cease and desist order issued against Sun Oil Company January 5, 1959.

[fol. 697] IN UNITED STATES COURT OF APPEALS

No. 17658

SUN OIL COMPANY,

versus

FEDERAL TRADE COMMISSION.

JUDGMENT—July 24, 1961

This cause came on to be heard on the petition of Sun Oil Company for review of an order of the Federal Trade Commission issued on January 5, 1959 in Docket No. 6641, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, set aside.

[fol. 698] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 699] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1961

No.

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

SUN OIL COMPANY.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 20, 1961

Upon Consideration of the application of counsel for petitioner,

It is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 22nd, 1961.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 20th day of October, 1961.

[fol. 700] SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1961

No. 629

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

SUN OIL COMPANY

ORDER ALLOWING CERTIORARI.—February 19, 1962.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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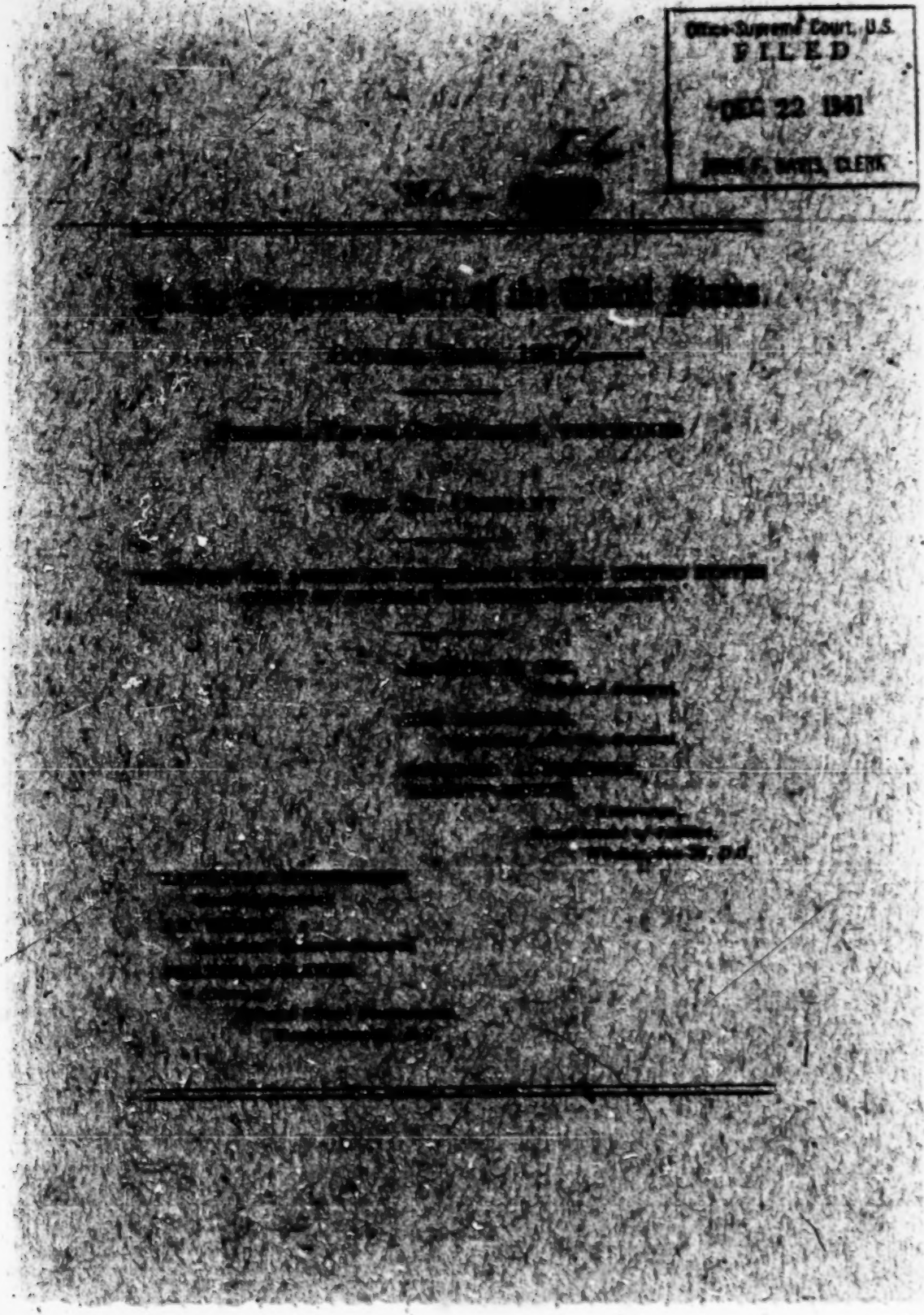
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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUN OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on July 24, 1961.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–37a) is reported at 294 F. 2d 465. The opinions and order of the Federal Trade Commission (R. 61–73[1]; App. C, *infra*, pp. 1c–38c) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 1b) was entered on July 24, 1961. On October 20, 1961, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and in-

[1] "R" refers to the printed record in the court of appeals.

cluding December 22, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2(b) of the Clayton Act permits a seller to rebut a prima facie case of price discrimination, in violation of Section 2(a) of the Act, by showing that the lower price was given to a purchaser in good faith "to meet an equally low price of a competitor." The question presented is whether a wholesale seller establishes this defense by showing that it gave the discriminatorily lower price to its retail customer to aid the latter in meeting the price competition of a retail competitor.

STATUTE INVOLVED

Section 2 (a) and (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13 (a) and (b), provides in part as follows:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to in-

jure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

This case involves the validity of a decision by the Federal Trade Commission holding that respondent Sun Oil Company ("Sun") violated Section 2(a) of the Clayton Act in selling gasoline by granting price concessions to one of its retail dealers in Jacksonville, Florida, that it did not give to its other dealers in the same area. The Commission held that such price discrimination was not justified under Section 2(b) of the Act as made in good faith "to meet an equally low price of a competitor." The court of appeals held that Sun had established a defense under Section 2(b) and set aside the Commission's

cease-and-desist order. The facts relevant to these issues are not in dispute.[2]

Sun is a major integrated producer-distributor of petroleum products, including gasoline (R. 35–36). It does not ordinarily distribute these products directly to the public at retail, but through independent service station operators who lease their facilities and purchase their gasoline for resale from Sun (R. 35–36). Under this system of distribution, the expenses of operating the retail service stations and the risk of profit or loss in the retail operation rest with the service station proprietor rather than with Sun.

At the time of the events in question there were 38 service station proprietors selling Sun products in the Jacksonville, Florida, area (R. 35), which Sun divided into three sales territories (R. 37). One of these dealers was Gilbert V. McLean; he operated in a sales territory comprising eight stations (R. 36, 37). In June 1955 McLean and the other Sun dealers in his territory were purchasing gas from Sun at 24.1¢ per gallon for Sun's regular gasoline, and retailing it at 28.9¢ (R. 36, 37, 51).

In the same month the Super Test Oil Company opened a service station, selling gasoline under its own brand name, diagonally across the street from McLean (R. 36). The record does not indicate the extent, if

[2] The Commission also found that Sun had violated Section 5 of the Federal Trade Commission Act by entering into an illegal resale price-maintenance agreement with the particular dealer to whom it gave the price concessions. The court of appeals set aside that finding as not supported by substantial evidence. We are not seeking review of that ruling.

any, to which Super Test operates other than as a retailer or from what source it secures its gasoline, although there is some indication it operates more than one service station (R. 495–497). During most of the period between June and December 1955, Super Test sold its regular gasoline at 26.9¢ per gallon, 2¢ less than the price at which McLean was selling Sun's regular gasoline (R. 36). Since Super Test was a so-called "non-major" or "independent" brand of gasoline, as compared with the "major" name brands of which Sun was one (R. 36), this price differential at which Super Test sold did not adversely affect McLean's competitive position (R. 99, 125). On a number of occasions, however, generally on week ends, the Super Test station substantially cut the price of its gasoline, to as low as 21.9¢ per gallon (R. 36). On each of these occasions McLean's sales of Sun's gasoline at 28.9¢ declined substantially (R. 36).

McLean complained to Sun about the inroads on his business resulting from Super Test's price cutting and sought relief in the form of a reduction in the price he was paying Sun (R. 36, 99, 101). At first Sun did nothing, but in late December it advised McLean that, if Super Test reduced its price again, Sun would come to his assistance (R. 51, 103). On December 27, 1955 Super Test cut its price from 26.9¢ to 24.9¢ and, pursuant to the previous understanding, Sun the same day gave McLean a price allowance or discount of 1.7¢ per gallon. McLean then cut the price of his regular gasoline by 3¢, from 28.9¢ to 25.9¢ (R. 36, 109, 111). Super Test within the next day or two reduced its

price for regular gasoline to 23.9¢ (R. 127, 133), a figure which it maintained until February 16, 1956, when it cut its price further to 22.9¢ (R. 509). This was reduced to 19.9¢ on February 28, 1956 (*ibid.*).

Prior to December 27, 1955, when Sun gave McLean the 1.7¢ price allowance, none of the other Sun dealers in the Jacksonville area had ever complained that they were being injured by Super Test's price cutting practices. However, after Sun gave McLean the 1.7¢ price allowance, four of the other Sun dealers in McLean's sales territory, operating stations located at distances varying from less than a mile to approximately three and one-half miles from McLean's station (R. 64, 65), lost business as a result of the price allowance granted McLean. At least three of them complained to Sun and asked Sun to give them equal price allowances (R. 39, 40, 44). Sun, however, refused to do so until mid-February 1956 when, after a general price war had broken out in the Jacksonville area and other major gasoline suppliers had already lowered their prices to their dealers, Sun reduced the prices at which it sold its gasoline to all its dealers in the area (R. 37).

As a result of the price allowance given to him by Sun and the lower prices at which he sold at retail, McLean's sales substantially increased (R. 37, 53). During the same period the sales of the three complaining Sun dealers substantially diminished (R. 64–65) and a fourth dealer testified to the loss of specific customers to McLean (R. 66). However, on February 18, 1956, despite the increase in sales, Mc-

Lean, who had cut his profit margin by 1.3¢ per gallon, went out of business (R. 69).

On September 26, 1956 the Commission instituted these proceedings by a complaint charging Sun with violations of both Section 2(a) of the Clayton Act and Section 5 of the Federal Trade Commission Act (R. 17). After full hearings the examiner issued an initial decision (R. 32), concluding that Sun had violated both statutes as charged, and proposing a cease-and-desist order (R. 58). The examiner rejected Sun's defense that its granting of the preferential discount to McLean had been a good faith effort to meet an equally low price of a competitor, on the ground that "the proviso in 2(b) has reference to the good faith meeting of competition of the seller, and not the competition of the buyer, as in this case" (R. 46).

On appeal, the Commission affirmed, adopting the examiner's findings and order (R. 61). With respect to the Section 2(b) defense, the Commission stated (R. 67–68):

> The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition.
>
> As pointed out by the hearing examiner, this argument goes beyond the plain wording of the proviso which has reference to the good

faith meeting of competition of the seller, rather than that of the buyer.

The Court of Appeals for the Fifth Circuit reversed. It held (App. A, *infra*, p. 32a) that, since the gasoline sold by Sun was in competition with the gasoline sold by Super Test, and since Sun marketed its gasoline through an independent filling station which was in direct competition with the Super Test station, Sun was in competition with Super Test and is "entitled to assert the defense of meeting competition in good faith." It rejected the Commission's view—which it recognized was supported by the only prior judicial decision[3]—as "unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act" (*id.* at 10a). The court "recognized that some dealers may suffer a diversion of business when the supplier lowers its price to meet competition" (*id.* at 17a). The court concluded, however, that "[t]aking a coldly objective view of this case, one would have to say that, regardless of some injury to certain Sun dealers, Super Test's price cutting and Sun's response of making an allowance to McLean benefitted consumers and the competitive process in at least two ways: by promoting competition at the retail level and by providing an opportunity for a major to break away from a uniform pricing system characteristic of an oligopolistic industry such as the oil industry" (*id.* at 18a, footnotes omitted).

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[3] *Enterprise Industries, Inc.* v. *Texas Co.*, 136 F. Supp. 420 (D. Conn.), reversed on other grounds, 240 F. 2d 457 (C.A. 2), certiorari denied, 353 U.S. 965, discussed *infra*, pp. 10–11.

REASONS FOR GRANTING THE WRIT

This case presents an important question concerning the meaning of the defense provided by Section 2(b) of the Clayton Act where a seller's discriminatory lower price is "made in good faith to meet an equally low price of a competitor." The court of appeals held that the defense is available when the purpose of the seller in lowering its price to a particular buyer is not to meet the equally low price which one of its own competitors has offered to the buyer, but to enable the buyer to meet the lower price at which one of the buyer's competitors is selling. We submit that the court of appeals has thereby expanded the Section 2(b) defense in a way that is not justified by, but is indeed contrary to, the language and the legislative history of the statute and the pertinent judicial decisions. The court's attempt to give the defense a "broad and simple construction" that recognizes "the facts of life in marketing gasoline" (App. A, *infra*, pp. 32a, 10a), while perhaps superficially plausible, in actuality produces a result that is contrary to the basic purpose of the Robinson-Patman Act to protect small businesses from discriminatory price cutting by large and powerful firms.

1. Section 2(b) permits a seller to rebut a prima facie case of price discrimination "by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor." A "competitor" of a seller is one who is attempting to sell to the same customer as the seller. Normally "competing" producers or wholesale distributors are those attempting to sell their products to the same retail outlets. Con-

ceivably wholesale sellers could be said to be "competitors" where they are attempting to have their goods reach the same ultimate consumers. But the seller who grants a discriminatorily lower price in order to enable the retailer-*buyer* to compete with the lower prices of the buyer's competitor is not meeting the lower price of a "competitor" of the seller. As the Commission pointed out (R. 67):

> The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street.

The same construction was given Section 2(b) by the only other court that has considered the issue. *Enterprise Industries, Inc.* v. *Texas Co.*, 136 F. Supp. 420 (D. Conn.), reversed on other grounds, 240 F. 2d 457 (C.A. 2), certiorari denied, 353 U.S. 956. In that case a Texaco service station alleged that the oil company had violated Section 2(a) by selling gasoline to other Texaco dealers in the area at lower prices. The district court found that a prima facie case had been established under Section 2(a), and rejected the proffered Section 2(b) defense on the ground, among others, that "[t]here is no evidence that the price charged any of the competing [favored] dealers was not lower than a lawful price at which gas was offered to the dealers by other refiners" (136 F. Supp. at 421). The court stated (*ibid.*, emphasis in original):

> Moreover, Texas could justify discrimination only by a showing that it dropped its price to

the other stations to meet an equally low price made available to those other stations by a competing oil company. In view of the short term station and equipment leases in effect with some stations, perhaps it is a fiction to speak of price competition at the oil company sale to the station level. That is the competitive level at which the justification is provided for defendant in the Act however. The Act does not go so far as to allow discriminatory price cutting to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the *seller's* competitor. The end effect is the same, perhaps, but the scheme adopted by Texas allows it, without first determining the price offered by its competitor, a flexibility that could result in undesirable discrimination between purchasers from Texas. The defense is not established.

2. The legislative history of Section 2(b) supports the view that the Section 2(b) defense does not permit a seller to meet the competition of his buyer's competitor. That history is thoroughly canvassed in the majority and minority opinions in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231. As there noted (pp. 247, n. 14, 256), Congress passed the Robinson-Patman Act because it believed that the broad provision in the original Clayton Act which permitted price discriminations "made in good faith to meet competition" had seriously weakened the effectiveness of that Act in preventing predatory discriminatory pricing. See S. Rep. No. 1502, 74th Cong., 2d Sess., p. 4; 80 Cong. Rec. 3113, 3119. Because of this concern, the original bills proposed to eliminate the meet-

ing-competition defense. See H.R. 8442, 74th Cong., 1st Sess., S. 3154, 74th Cong., 1st Sess. The House Committee, in reporting out the bill, did not go that far. Instead, it recommended a "contraction" (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 16) of the scope of the defense and, insofar as price discrimination is concerned, it proposed the language now in Section 2(b). It explained that this language "permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further" (*ibid.*). In the *Standard Oil* case, *supra* at 242 (emphasis added), this Court explained that the amendment left only "the actual core of the defense. That still consists of the provision that *wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer,* may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved."

In other words, the narrow exemption that Congress provided by the Section 2(b) defense protects only the right of a seller to retain its own customer where loss of that customer is threatened by "a lawful lower price of a competitor" of the seller. There is nothing in the legislative history, however, that indicates or even suggests that Congress intended the proviso to permit price discriminations aimed at meeting a seller's competition generally. Such a result would be to reinstate the broad provision of the original Clayton Act which Congress intended sharply to curtail in the Robinson-Patman Act.

3. Other statements in the *Standard Oil* case further support the view that Section 2(b) sanctions only the meeting of the competition of another seller who is attempting to take away a customer. The Court there stated (340 U.S. at 244) that in its earlier opinion in *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U.S. 746, "[t]he discussion proceeds upon the assumption * * * that if a competitor's 'lower price' is a lawful individual price offered to any of the seller's customers, then the seller is protected, under § 2(b), in making a counteroffer provided the seller proves that its counteroffer is made to meet in good faith its competitor's equally low price." The Court in *Standard Oil* then went on to state (pp. 249-250, emphasis added) that where "a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors," "[t]here is * * * *plain language* and established practice *which permits a seller, through § 2(b), to retain a customer* by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers." See also *id.* at 242.

4. The court of appeals concluded that a "broad and simple" construction of Section 2(b) was justified because of the peculiar organization of the oil industry (App. A., *infra*, p. 32a). The court viewed the independent service station operator as a mere "conduit" between the supplier and the motorist (*id.* at 24a) and concluded that there is normally no competition between suppliers for the business of particular retail out-

lets.[4] But in a real sense all producers of consumer goods are distributing their product to the public through the conduit of retail outlets, which may or may not handle the products of competing suppliers. Where, as here, the retailer's business is not sought by the suppliers of competing products, the Section 2(b) defense protecting suppliers against losing retailer customers to price cutting competitors is not applicable. But this fact does not justify converting the proviso into the broad "meeting competition" defense, which Robinson-Patman specifically narrowed. This Court in *Standard Oil Co.* v. *United States*, 337 U.S. 293, 312, rejected the view that the specific organization of the oil industry could affect the applicability of the "narrowly directed" provisions of Section 3 of the Clayton Act. The same reasoning is applicable here.[5]

5. The court of appeals was of the view that the kind of price discrimination in which Sun here engaged "benefitted consumers and the competitive process in at least two ways: by promoting competition at

[4] The court of appeals assumed that Super Test was a partially integrated "supplier-retailer," and that Sun, a supplier, was thus competing, through its independently operated service stations, with the retail outlets owned by Super Test (see App. A, *infra*, pp. 4a, 14a, 17a, 32a). As shown *supra*, pp. 4–5, the evidence of record does not indicate that Super Test was anything more than a retailer. But this factual error does not appear to be material to the court of appeal's basic position, since Super Test either was a supplier-competitor of Sun's or purchased its gasoline from such a supplier. In either case Sun could, under the court's rationale, be said to be reducing its price to McLean to meet its competition.

[5] The court below relied upon a dissenting opinion in the *Standard Oil* case.

the retail level and by providing an opportunity for a major to break away from a uniform pricing system characteristic of an oligopolistic industry such as the oil industry" (App. A, *infra*, p. 18a). We believe that, viewed realistically and from a somewhat longer range viewpoint, the likely effect of the decision below is precisely the opposite. It will not protect, but will injure, competition at the retail level; and it will not provide an opportunity for a major to "break away" from the price uniformity that generally characterizes the retail distribution of gasoline, but will tend to hinder the development of any real and permanent price competition in that segment of the industry.

The court of appeals' construction of Section 2(b) gives the majors a new and potent weapon in fighting price-cutting independents. They can now engage in selective price warfare against the individual outlets of the independents, conducted through selected service stations and at the inevitable expense of their other service stations in the same area (see the Statement, *supra*, p. 6). The independents cannot hope to compete successfully with the majors on such terms; they will be coerced into avoiding price competition; and the inevitable long term result will be further to rigidify the price structure in the industry.

Thus, the ultimate effect of the court of appeals' interpretation of Section 2(b) is to protect the majors' retail markets against the price competition of independents. The Commission's interpretation, on the other hand, while it leaves the majors free to reduce prices uniformly to meet competition, has the

practical effect not only of protecting the majors' retailer outlets against discrimination, but also of safeguarding the smaller independent companies against purely predatory price-cutting at one or two stations. As such, the Commission's interpretation is plainly the more consonant with the basic purpose of the Robinson-Patman Act.

Although the court of appeals dealt with the statutory question in terms of the particular distribution practices of the oil industry, the legal issue is not thus limited. The question affects all segments of American industry in which retail outlets handle the products of only a single producer. The meaning of the Section 2(b) defense has been the subject of considerable discussion and uncertainty.[6] An authoritative interpretation would aid both the Commission and business by further defining the limits that the Robinson-Patman Act imposes upon price discrimination.

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[6] Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L.J. 935 (1957); Austin, *Price Discrimination and Related Problems under the Robinson-Patman Act* (2d rev. ed. 1959), pp. 93–104; Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), pp. 179–186; S. Rep. No. 2810, 84th Cong., 2d Sess., pp. 19–23; H. Rep. No. 2966, 84th Cong., 2d Sess., pp. 76–82. The decision of the court of appeals in the present case is discussed in 75 Harv. L. Rev. 429 (1961) and 47 Va. Law Rev. 1229 (1961).

CONCLUSION

The question is an important one in the administration of the Clayton Act, which this Court should decide. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1961.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 17658

SUN OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO REVIEW ORDER OF THE FEDERAL TRADE COMMISSION

(July 24, 1961)

Before JONES, BROWN, and WISDOM, *Circuit Judges*

WISDOM, *Circuit Judge:* This controversy between Sun Oil Company, petitioner, and the Federal Trade Commission was generated by a price battle between two filling stations. The issues relate to an alleged secondary-line price discrimination violative of the Robinson-Patman Act and the Federal Trade Commission Act. The key question is whether the defense of meeting competition in good faith is available to a supplier of gasoline when the supplier reduces the wholesale price of its gasoline to one of its filling stations engaged in a price battle at the consumer level with a station owned and operated by a competing supplier. We hold for the petitioner.

Sun, a major oil company, refines, sells, and distributes gasoline throughout the United States. It sells only one grade, Blue Sunoco. In 1955 Gilbert McLean, one of Sun's thirty-eight retail dealers in

Jacksonville, Florida, operated a filling station on the corner of 19th and Pearl streets in Jacksonville.[1] McLean was an independent contractor[2] but, like virtually all filling station operators, he sold gasoline purchased from only one supplier. He bought gasoline from Sun Oil Company at 24.1 cents a gallon and sold it at 28.9 cents a gallon, then the prevailing price in the Jacksonville area for gasoline sold under a major supplier's brand. Late in June 1955 Super Test Oil Company, a "non-major"[3] competitor of

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[1] Sun divided Jacksonville into three sales territories. McLean and seven other dealers were located in the territory consisting roughly of the north one-third of Duval County. The examiner found that the pattern of traffic flow in this sales territory was such that motorists traveling from northern and northwestern Duval County to the downtown Jacksonville area had ready access to all of these stations.

[2] "Service stations today may be divided into five groups and the number in each roughly estimated as follows: (1) over 3,000 owned by suppliers and run by salaried managers; (2) about 8,000 of the new and rapidly growing 'commission-type' stations run as independent businesses except that they buy their gasoline on consignment, thus giving the supplier control over prices; (3) some 90,000, more or less, which are leased by the supplier—usually a refiner, but often a jobber and occasionally the owner of a chain of stations—to the operator, subject to cancellation for unsatisfactory performance; (4) perhaps 15,000 or 20,000 leased by the dealer from a third party; and (5) the remaining 60,000 or so which are on land and premises owned by the dealer himself. Types (4) and (5) are the 'independent' or 'contract' stations whose operators merely buy their gasoline, and usually other products, on contract from their suppliers." Whitney, 1 Antitrust Policies—American Experience in Twenty Industries 125 (Twentieth Century Fund, N.Y. 1958).

[3] The line between a "major" and a "non-major" oil company or "independent" is not well-defined. A major oil company is usually integrated in that it operates on the four functional levels of production, transportation, refining, and marketing. Generally, a non-major does not own its refinery,

Sun's, opened a filling station across the street from McLean's station and began selling Super Test "regular" gasoline at 26.9 cents a gallon, then the prevailing price in Jacksonville for off-brand gasoline. McLean testified that he was not hurt competitively as long as the differential between Sunoco and Super Test was two cents.[4] In August the Super Test station commenced a series of price cuts which were advertised on curb signs in front of the station and also in the newspapers. August 27 Super Test dropped its posted price to 21.9 cents a gallon and August 28

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or if it does, the refinery is usually small. The non-major usually owns and operates its filling station. The off-brand gasoline a non-major sells has a lower octane rating than a name-brand gasoline. Super Test had an octane rating of 87.5 as against Sunoco's rating, in 1955, of 92.5. There are about twenty vertically-integrated but not self-contained majors.

[4] "Private brands generally come to rest at a differential around 2 cents at retail below major brands." de Chazeau and Kahn, Integration and Competition in the Petroleum Industry 466 (Yale U. Press, 1959). In a case study of a price war in Philadelphia the author states. "The Sun management believed that a branded gasoline could effectively compete with a non-branded gasoline which sold for only one to two cents less." Comment, Competition in Gasoline Retailing: A Price War, 101 U. of Pa. L. Rev. 643, 645 (1953). In the instant case the Sun official in charge of market research testified that it was not unusual to find markets where the differential is only one cent; that in a sub-normal market, such as a price war, the pattern has been for the majors to post prices within one cent of the non-majors. The examiner regarded this as evidence of predatory pricing to whip non-majors into line; Sun insists that the dealer posts whatever price *he* chooses, and that in a price war a dealer tries to protect himself by posting a price with a one cent differential.

The determination of a sound differential is made more difficult when, as in the instant case, the non-major gives trading stamps. Sun officials regard such a practice as equivalent to a further reduction of one cent in the price of gasoline.

dropped its price to 20.9 cents a gallon. Then and later, whenever Super Test cut its prices McLean's sales declined substantially.[5] On a number of occasions, after reducing prices and gaining customers at McLean's expense, Super Test reestablished the customary two-cent price differential between its gas and Sunoco. On at least one occasion Super Test maintained its low price for a week.

McLean and Super Test competed for gallonage with McLean always the loser. He was a sitting duck. Super Test, a vertically integrated company[6] operat-

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[5] The monthly gallonage was:

	McLean	Supertest	
		Regular	Premium
June 1955	7,145	------	-----
July 1955	7,466	5,047	1,329
August 1955	6,735	15,300	4,292
September 1955	6,400	10,694	2,693
October 1955	6,495	10,925	2,648
November 1955	5,946	11,066	2,398
December 1955	8,368	18,906	3,954
January 1956	32,115	61,672	7,890
February 1956	------	67,156	8,520

McLean's December and January figures reflect the increase in sales after Sun's allowance of 1.7 cents on December 27, 1955. McLean's daily sales in February 1956, until he went out of business February 18, averaged about the same as January sales.

On August 26, 1955, when Super Test's regular gas was posted at 26.9 its station sold 127 gallons plus 21 gallons from the truck pump; on August 27, when the price dropped to 21.9, the station sold 3,583 gallons plus 263 from the truck pump, and 1,324 of ethyl (at 23.9). On August 28, when the price was cut to 20.9 for the regular, Super Test sold 4,931 gallons plus 278 from the truck pumps, and 1,611 gallons of ethyl. On August 29, when the Super Test price went up again to 26.9 and 28.9, the station sold 408 gallons of the regular plus 38 from the truck pump, and 137 gallons of ethyl.

[6] "All of the largest companies and many of the smaller ones are integrated vertically. Though the physical flow of oil from well to user may be almost continuous, the sequence of operations traditionally falls into a number of broad categories * * *. Vertical integration occurs when the activities of a single com-

ning its own filling stations, could fix any retail price it pleased; McLean's price to the public was dependent on Sun's price to him. The Examiner found that McLean made it clear to Sun that unless something

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pany span two or more of these stages." de Chazeau & Kahn, Integration and Competition in the Petroleum Industry, p. 19 (Yale U. Press, 1959). Vertical "integration appears in many contexts"; it is "the combination under single ownership of successive stages in a particular cycle of production." Rostow, Entry into the Oil Refining Business: Vertical Integration, 61 Yale L. J. 856, 860, 878 (1952). For a comprehensive study of integration in the petroleum industry, in addition to de Chazeau and Kahn, see McLean and Haigh, The Growth of Integrated Oil Companies (Boston, Harvard Business School, 1954).

"During the 1920's the major oil companies expanded their direct operation of service stations; but retail price cutting after 1929 began to reveal weaknesses in this policy. Independent stations took business away from company stations because they could cut prices on shorter notice, with less risk of ill will, and without violating the Clayton Act or one-price laws in a number of states. Between 1933 and 1934 the number of stations owned by eighteen majors was reduced from 125,327 to 98,246, and by 1935 it was only 75,547. The new factor which became effective in 1935 was Iowa's severe tax on chain stores, including stations. Standard of Indiana at once leased out to their operators all its stations in the state, and this 'Iowa plan' quickly spread to other refiners and other territories. Besides escaping the chain store tax, which seven states had adopted at the end of 1939, the refiners were glad to be relieved of responsibility for service station employees, who were now being organized into unions and covered by social security and wage and hour legislation.

"The number of refiner-operated stations continued to decline, amounting to only about 3,000 [less than 2%] in 1956. Although some majors still keep a core of salaried dealers, most of them have retained only a few selected locations to use as models or experimental and training plants, and for the profit of their concentrated, high-volume sales." Whitney, 1 Antitrust Policies 125 (1958). Here, Sun's integration stopped short of retailing through company-owned stations.

could be done to meet the Super Test competition he would be forced out of business. In the four months following Super Test's August "Grand Opening Special" McLean repeatedly asked Sun to reduce its wholesale tank-wagon price to him to a level that would allow Sunoco to compete with Super Test. Sun carefully considered the situation, but for four months gave no price allowance to McLean.

The week-end of December 3, 1955 Super Test dropped its price to 21.9 cents a gallon. A few days later the price went up again but after a short lull, with Sunoco still at 28.9 cents a gallon and Super Test at 26.9 cents a gallon, Super Test dropped its price to 24.9 cents a gallon. This was the last straw. McLean told Sun's regional manager that he was going out of business. The manager reported to his home office that the situation was "desperate." McLean informed the manager that to meet the competition he would have to post a price of 25 cents a gallon, but he could not afford to do so unless Sun gave him some relief. He followed this with a request by letter for assistance that would enable him to sell at 1.8 cents a gallon above the posted dealer tank-wagon price of 24.1 cents a gallon.[1] December 27, 1955, Sun gave a discount to

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[1] The letter, dated December 27, 1955, read, in accordance with a company form: "Please be advised that I am confronted with a depressed retail gasoline price situation which has affected my business * * *. In order to meet this competition, it will be necessary for me to sell Blue Sunoco gasoline at a retail service station price that is 1.8 cents per gallon above the posted dealer tankwagon price at which I now purchase same under my Dealer's Agreement.

"Therefore, I am requesting assistance from you to help me in meeting these competitive conditions."

McLean of 1.7 cents a gallon.[5] Sun reached this decision after a study of gallonage records of its Jacksonville dealers and a report from its regional manager, familiar with the local situation, led it to conclude that only McLean was affected adversely by Super Test's price-cuts and a price allowance could be made to McLean to put Sunoco on a competitive level with Super Test at 19th and Pearl streets without adversely affecting any other Sun dealer in Jacksonville.[6] McLean cut his price three cents, to 25.9 cents, thereby absorbing 1.3 cents of the cut and reducing his normal gross profit from 4.8 cents to 3.5 cents. Sun officials and McLean testified that there was no agreement or understanding to fix his retail price. The Examiner found, however, that there was such an agreement. The next day or one day thereafter Super Test reduced its price to 23.9 cents, reestablishing the 2-cent differential. McLean maintained his price at 25.9 cents and kept it there until he went out of business. Shortly after Sun reduced its tank-wagon price to McLean, other dealers in the Jacksonville area complained about not being given the same allowance. Then, February 16, 1956, what had been a skirmish on the corner of 19th and Pearl became a full-scale price war in the Jacksonville area. February 16 Super

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[5] Sun's policy is to make certain that an operator grosses at least 3.5 cents a gallon. Sun considers this the minimum margin on which a dealer can exist. 3.5 is 1.3 cents less than McLean's usual profit of 4.8 cents. Since McLean elected to reduce his posted price to 25.9 cents a gallon, a drop of 3 cents, it was requisite that the company allow 1.7 cents in order for him to gross 3.5 cents.

[6] Four of the seven other Sun dealers in the same sales territory as McLean testified. The Examiner found that these dealers were in substantial competition with McLean and that they were competitively injured by the price allowance granted McLean

Test lowered its price to 22.9 cents for its regular gasoline and 25.9 cents for ethyl. Then, after several major suppliers reduced their tank-wagon price, Sun dropped its tank-wagon price to all of its dealers in the area.

Sun's price allowance to McLean on December 27, 1955, came too late to help him. February 18, 1956, he went out of business. It was just as well: February 28, Super Test cut its regular gasoline to 19.9 cents and its ethyl to 22.9 cents.

September 28, 1956, the Federal Trade Commission filed a complaint against Sun charging it with having violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,[10] by selling gasoline to

[10] 49 Stat. 1526 (1936), 15 U.S.C. §§ 13–13b, 21a, Section 2(a) provides: "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or any other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *."

Section 2(b) provides: "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation

McLean at a lower price than Sun charged other retail dealers in the same market area. In defense, Sun asserted that the allowance to McLean was a good faith price reduction to meet competition, as permitted under Section 2(b) of the Robinson-Patman Act. The complaint charged also that Sun violated Section 5 of the Federal Trade Commission Act by conspiring with McLean to fix the retail price of Sunoco at McLean's station.[1] Sun denied this charge. The Commission, adopting in full the Hearing Examiner's findings and conclusions, issued a broad order against Sun, directing it to cease and desist from discriminating in prices; the order applies not only to the sale of gasoline but also to the sale or distribution of any Sun products. On Sun's petition to review and set aside the Commission's cease and desist order, we grant review and set aside the order.

I

The Commission contends that the defense of meeting competition is available to a seller only to meet direct competition for the business of his customer; that Sun could reduce its price to McLean only if Super Test offered gasoline to McLean at prices cheaper than Sunoco. Here, however, so the Commission argues, the seller granted a price reduction to a favored dealer in order to help *that* dealer meet

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of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained [herein] shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser * * * was made in good faith to meet an equally low price of a competitor. * * *"

[1] 38 Stat. 719 (1914) as amended by 52 Stat. 111 (1938), 15 U.S.C.A. § 45.

his retail competition.[12] Respect for a federal agency's unquestioned expertise does not require the Court to abdicate its judicial responsibility of construing the statute in the factual setting, strongly as counsel for the Commission argues that the weight to be given the facts and inferences is for the Commission.[13] We consider the Commission's construction of the Act unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act.

Section 2(a) of the Robinson-Patman Act requires a seller to charge uniform prices to competing purchasers; proof of a price discrimination establishes a prima facie violation of Section 2(a). "[A] price discrimination within the meaning of that provision is merely a price difference." *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 1960, 363 U.S. 536, 80 S.

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[12] The hearing examiner stated merely that "the proviso in Section 2(b) has reference to the good faith meeting of competition of the seller, and not the competition of the buyer as in this case." The Commission opinion simply states: "The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition. As pointed out by the hearing examiner, this agreement goes beyond the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer."

[13] See footnote 42. See Comment, The New Federal Trade Commission and the Enforcement of the Antitrust Law, 65 Yale L. J. 34, 81–85 (1955). See also Schwartz, Legal Restriction of Competition in the Regulation Industries: An Abdication of Judicial Responsibility, 67 Harv. L.R. 436, 471–475 (1954).

Ct. 1267, 4 L. Ed. 2d 1385. However, as the Seventh Circuit pointed out in Anheuser-Busch on remand, the "Supreme Court, at 553, disclaimed any flat prohibition of price differentials, recognizing that price differentials constitute but one element of a Section 2(a) violation". *Anheuser-Busch, Inc.* v. *Federal Trade Commission*, 1961, * * * F. 2d * * *. Other parts of the statute allow price reductions which meet established criteria; the Act clearly "places emphasis on individual competitive situations".[14]

Section 2(b), on which Sun relies, allows a seller, in an individual competitive situation, to rebut a prima facie violation of Section 2(a) by showing that his "lower price * * * was made in good faith to meet an equally low price of a competitor". This proviso creates a substantive defense or "justification" that overrides the importance of any competitive injury and is absolute in nature.[15] The Section 2(b) defense raises a question of fact in each case as to whether the competition justifies the discrimination.[16]

In holding the defense of meeting competition inapplicable, the Examiner and the Commission relied

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[14] *Federal Trade Commission* v. *Staley*, 1945, 324 U.S. 746, 753, 65 S. Ct. 971, 89 L. Ed. 1338.

[15] *Standard Oil Co.* v. *Federal Trade Commission*, 1951, 324 U.S. 746, 71 S. Ct. 240, 95 L. Ed. 239.

[16] "Prior to the Robinson-Patman amendments, § 2 of the Clayton Act provided that nothing contained in it 'shall prevent' discriminations in price 'made in good faith to meet competition.' The change in language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination. See the Conference Report, H. Rep. No. 2951, 74th Cong., 2d Sess., pp. 6, 7; see also the statement of Representative Utterback, the Chairman of the House Conference Committee, 80 Cong. Rec. 9418." *Federal Trade Commission* v. *Staley Mfg. Co.*, 1945, 324 U.S. 747, 752, 65 S. Ct. 971, 89 L. Ed. 1338.

on *Enterprise Industries, Inc.*, v. *Texas Co.*, D.C. Conn., 1955, 136 F. Supp. 421; rev'd on other grounds, 2 Cir., 1957, 240 F. 2d 457; cert. den., 1957, 353 U.S. 965, 77 S. Ct. 1048, 1 L. Ed. 2d 915. There is no other reported case directly in point.[17]

In Enterprise the plaintiff operated a Texaco station selling gasoline purchased only from the defendant, Texas Company. The plaintiff's station, near Hartford, Connecticut, on a well-traveled interstate highway, competed with other stations on the highway for the business of transient motorists, and it also competed for local business with nine stations off the highway selling Texaco. Hartford gas stations were in a price war. Texas Company, under the spur of declining sales, made price allowances to both local and highway Texaco dealers in the gas war area on condition that they match (but not undercut) the prices of their competitors selling rival brands. The amount of the allowance depended on the prevailing neighborhood price. The price in Hartford was lower than it was on the highway, so that Texas Company sold to its Hartford dealers at a lower price than it sold to the plaintiff. The plaintiff sued for treble damages for price discrimination under Section 2(a). The district court rejected the meeting competition defense, holding that by granting a price differential between purchasers who competed with each other

[17] The Commission filed complaints in two actions that are similar to the complaint filed against Sun. Both these matters are still pending before the Commission. The Pure Oil Co., F.T.C. Dkt. 6640 (1956); The Texas Co., F.T.C. Dkt. 6898 (1957).

Texas Company violated Section 2(a) of the Robinson-Patman Act.[18] The district court stated:

> Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made available to those other stations by a competing oil company. In view of the short term station and equipment leases in effect with some stations, perhaps it is a fiction to speak of price competition at the oil company sale to the station level. That is the competitive level at which the justification is provided for defendant in the Act however. The Act does not go so far as to allow discriminatory price cutting to enable a buyer to meet price competition, but only to enable the seller to meet a lawful price of the seller's competitor (136 F. Supp. 421).

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[18] In Enterprise the district court pointed out that the burden was on Texas Company to prove the price of its competing refiner. There was no evidence of such price and none that the Texas Company's prices were not *lower* than its competitors. Further, there was no evidence that the prices of the competitors were lawful prices. The defense of meeting competition failed on these grounds. The district court did not rule on whether a supplier was meeting *his* competition in giving an allowance to a dealer who also had competition to meet. That was not the case before it.

On appeal the Second Circuit did not reach the substantive issue, dismissing the case on the ground that the plaintiff had failed to prove the amount of its injuries. Nevertheless, Judge Hand, organ of the Court, seemed to take it for granted that the supplier's action was the natural and lawful response to a price raid from a competitor. He said:

"It is not uncommon in the industry for a filling station to start what has come to be known as a 'gas war'; that is to cut the prevailing price of gasoline, which other competing stations must meet by a corresponding cut in order to keep up their sales; and that makes it important for the producing companies to reduce their prices to their own competing stations" (240 F. 2d 457, 458).

The district court was fully aware of the unreality of its approach, as is evident from the court's admission that it is a "fiction to speak of price competition at the oil company sale to the station level"; a filling station operator carrying a brand-name gasoline does not buy from several competing oil companies.[19] Inherent in the court's conclusion, and in the position of the Commission in this case, is the notion that although a supplier's product competes with the products of other suppliers for the motorists' trade a supplier is not in competition at the consumer level—even with a supplier-retailer; or, if he is, the Act ignores it. Thus, if Super Test had attempted to increase its share of the market by offering its gasoline to McLean at a price under Sun's price, the Commission—so it says in regard to such an unusual situation—would have allowed Sun to meet the competition by reducing its

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[19] W. W. Wright, 35 years with Sun, Sales Manager and Vice-President of Sun, testified: "I would say all gasoline is sold to the public through stations operating or handling one brand of gasoline.

"Although the Standard Stations and Richfield cases dealt primarily with exclusive dealing in gasoline, there is in fact little future in the attempt to have stations handle more than one brand. 'Split pump stations,' as they were called, were formerly quite common, but defects of the system caused most of them to disappear. As early as 1931 two surveys showed 85 and 95 per cent of motorists expressing themselves as opposed to it, primarily out of fear that the dealer would substitute the second brand for the desired one. Not only did dealers find that handling one brand required less investment and less bookkeeping, but six out of seven felt that it actually increased sales. As to suppliers, they naturally dislike operating through dealers whose lack of special enthusiasm for their own brand is obvious to the customer.

"In bringing the Standard Stations suit, the Department of Justice probably had in mind elimination of exclusive dealing in motor oil and TBA as much as or more than in gasoline." 1 Whitney 126, op. cit.

prices to McLean. Yet Super Test accomplishes the same purpose by undercutting McLean, and the Commission gives its blessing to the practice. The Commission would have Sun sit and watch Super Test squeeze McLean out of business and take over Sunoco customers at 19th and Pearl. A result so extreme mocks the principle. "The heart of our economic policy long has been faith in the value of competition"; "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor". *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 248.

To our way of thinking, the court's approach in Enterprise, and the Commission's doctrinaire approach here are inconsistent with the view of gasoline marketing taken in the "Detroit" opinion, *Standard Oil Company* v. *FTC*, 1951, 340 U.S. 231, 71 S. Ct. 240, 95 L. Ed. 239.[20] Standard Oil of Indiana, to meet a competitor's price, sold gasoline to four wholesalers, jobbers, in the Detroit area at a lower price than it charged its retail dealers. The jobbers passed on this saving to their customers who were able to undercut retail dealers buying directly from Standard Oil. The Commission took the position that Section 2(b) merely allowed rebuttal of a prima facie case, and was not a substantive justification of an otherwise unlawful

[20] "The canons of construction applied by the Supreme Court in the 1951 'Detroit' opinion are the direct antithesis of those employed by the District Court in Enterprise." Steed, Antitrust Problems Under Price War Conditions, Southwestern Institute on Antitrust Laws, 77, 100 (1958). (It should be pointed out that Steed is an attorney for the Texas Company).

"The Enterprise view of the good faith defense is in sharp contrast with that expressed by the Supreme Court in *Standard Oil Co.* v. *FTC*." Note, The Good Faith Defense of the Robinson-Patman Act, 66 Yale L.J. 935, 938 (1957).

price discrimination. The Supreme Court held that Section 2(b) good faith defense was absolute even through a substantial lessening of competition might result, and remanded the case to allow Standard "to show that its lower price to each jobber was made in order to retain that jobber as a customer and in good faith to meet an equally low price offered by one or more of its competitors." 340 U.S. 231, 236. The case is distinguishable on the facts, but the Court was acutely aware of the interaction of competition at various levels and recognized the validity of the defense even though the price differential would have an injurious effect on competition among the supplier's dealers and the dealers' purchasers:

> It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. Likewise, it must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller. 340 U.S. 231, 250.

The "actual core of the defense," the Supreme Court stated, "still consists of the provision that whenever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." 340 U.S. 231, 242. Here, there is no doubt that Super Test's prices threatened "to deprive" Sun of McLean as a customer. They did in fact deprive Sun of McLean as a customer. And they deprived Sun of sales, through McLean, to the motoring public. "Clearly, a seller's need for a lower price in response to a decrease in his sales is the same

whether the decrease occurs because his purchasers switch to a price cutting competitor or because [his purchasers] are unable to protect their share of the retail market from distributors of a rival product." [21]

In the instant case the Commission shows a proper solicitude for other Sun stations in McLean's sales territory. Sun denied that these stations suffered any substantial loss of business attributable to McLean. The Examiner found that four of these stations suffered a loss of trade, although they were located at distances of somewhat less than a mile to three and a half miles from 19th and Pearl streets and it would seem impossible to say whether they suffered a substantial loss of gallonage from Sun's price allowance to McLean or from Super Test's aggressive price cutting. But if the good faith defense is to have meaning *when applied to a supplier in competition with a supplier-retailer*, it must be recognized that some dealers may suffer a diversion of business when the supplier lowers its price to meet competition. This result is consistent with the theory of the Robinson-Patman Act in the light of national policy as expressed in the Sherman Act. The two statutes must be reconciled—if possible.[22] National policy favors consumers and the competitive process. Consumers favor the benefits of competition—not the benefits of buying from particular mer-

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[21] Note. The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 939, (1957). See also Casady & Jones, The Nature of Competition in Gasoline Distribution at the Retail Level, 79–92, 122–38 (1951).

[22] "It is our duty to reconcile such interpretation [of the Robinson-Patman Act], except where Congress has told us not to, with the broader antitrust policies that have been laid down by Congress." *Automatic Canteen Co.* v. *FTC*, 1953, 346 U.S. 61, 74, 73 S. Ct. 1017, 97 L. Ed. 454.

chants. Thus, the Attorney General's National Committee to Study the Antitrust Laws, emphasizes that the Robinson-Patman Act focuses on "the vigor of competition in the market rather than hardship to individual businessmen * * *. Incidental hardships on individual businessmen in the normal course of commercial events can be checked by a price discrimination statute only at serious risk of stifling the competitive process itself."[23] Taking a coldly objective view of this case, one would have to say that, regardless of some injury to certain Sun dealers, Super Test's price-cutting and Sun's response of making an allowance to McLean benefitted consumers and the competitive process in at least two ways: by promoting competition at the retail level and by providing an opportunity for a major to break away from a uniform pricing system[24] characteristic of an oligopolistic[25] industry such as the oil industry.

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[23] Report of Attorney General's National Committee to Study Anti-Trust Laws, 164–165 (1955). See also *Anheuser-Busch* v. *FTC*, 1959, 265 F. 2d 677.

[24] It has been suggested that the "belief that Standard's price discrimination [in the Detroit Case, 340 U.S. 231] thus encouraged competition both on retail and supplier levels may well have been behind the Justice Department's open disagreement with the FTC." Comment, Price Discrimination in Gasoline Marketing, the Detroit Jobbers Case, 19 U. of Chi. L. Rev. 58, 63[4] (1951).

[25] Rostow and Sachs write: "In short, in the case of the oil industry the beginning of analysis from the point of view of the antitrust laws is the proposition that the major companies are *oligopsonists* in the crude purchasing market and *oligopolists* in the sale of refined products." Entry Into the Oil Business, 61 Yale L. J. 856, 893 (1952). "A structurally oligopolistic market is one in which the few largest sellers in the market have a share of the market sufficient to make it likely that they will recognize the interaction of their own behavior and their rivals' response in determining the values of the market variables." Kaysen and Turner, Antitrust Policy, An Economic and Legal Analysis 27 (1959).

For precedent, the Commission relies solely on Enterprise. Sun, aside from the Standard Oil decision, finds aid and comfort in *Balian Ice Cream Co.* v. *Arden Farms*, 9 Cir., 231 F. 2d 356, cert. den. 350 U.S. 991 and *American Cooperative Serum Association* v. *Anchor Serum Co.*, 7 Cir., 1946, 153 F. 2d 907, cert. den. 329 U.S. 721. Balian is distinguishable in that the supplier cut its price on ice cream products to all of its customers in the entire Los Angeles market area, and the Court found that there was no injury to any of the customers.[26] In *American Cooperative Serum Association* v. *Anchor Serum Co.* the Association sold directly to consumers through druggists who acted as warehousemen or

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[26] Balian was a treble damage action under the Robinson-Patman Act in which the plaintiff ice cream manufacturers in Los Angeles contended that they were injured when the defendant Arden Farms, a manufacturer and distributor, lowered its prices on ice cream products in the Los Angeles area only. The Court upheld the defense of meeting competition. A number of the ice cream manufacturing plants were "captive creameries," in that they were owned by large chains and manufactured ice cream only for their owners. Customers supplied by Arden were in competition with retail outlets supplied by the captive creameries. Arden lowered its prices to its customers, retail dealers, to enable them to meet competition at the consumer level. It is clear that the captive creameries did not offer to sell at lower prices to Arden's dealers. Arden, therefore, is in the same position as Sun in the instant case. The district court (104 F. Supp. 796, 802), as well as the Court of Appeals, did not restrict the defense of meeting competition to the single situation where a supplier's retail dealer is offered lower prices by another supplier. The Court said: "The customers of Arden in the respective area are not in competition with each other, and the products sold in each area are sold in competition with like products manufactured by others."

agents; as a retailer the Association could meet the price of its competitors at the retail level."

According to the Commission, even without any judicial gloss Section 2(b) is clear and unambiguous: "the plain wording of the proviso * * * has reference to the good faith meeting of competition of the seller, rather than that of the buyer". Sun agrees that the section is clear and unambiguous: it contains no such restrictive language as the Commission reads into it, and Sun was within the scope of the proviso in reducing its price to McLean "to meet an equally low price of a competitor", Super Test. These conflicting constructions illustrate again that the Robinson-Patman Act is not distinguished for its clarity of expression.[22] Here the language of Section 2(b)

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[21] There is an analogy between the druggists, through whom American Cooperative Serum Association sold, and filling station operators—if one looks through the independent contractor status of gasoline retail dealers. Such dealers are something less than independent merchants and something more than the supplier's employees. They cannot try Sunoco one day and Esso the next; they are inextricably associated with the gasoline they sell. In American Cooperative Serum the Court treated the druggists as "warehousemen" or "agents": they actually received the serum on consignment.

[22] "The Robinson-Patman Act has been called, among other things, 'one of the most tortuous legislative pronouncements ever to go on the statute books'. [Dirlam and Kahn, Fair Competition, The Law and Economics of Anti-Trust Policy, 119 (1954)]. It has been dubbed 'complex and anomalous' [Markham, Report of the Attorney-General's Committee on Anti-Trust Laws, 70 Q. J. Econ. 211], 'prolix and perplexing' [Report of the Attorney General's Committee to Study Anti-Trust Laws, 172 (1955), and 'obscure' [id. at 175].] I am sure it has been called other things which have not been recorded and which could not be repeated here." Boles, Marketing and the Robinson-Patman Act, Southwestern Legal Foundation 1958 Institute on Anti-Trust Laws, 1. See also *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 65. 73 S. Ct. 1017, 97 L. Ed. 454.

seems imprecise enough to support either interpretation.[20] Turning to the legislative history of the Act for enlightenment, we find Delphic generalities but no evidence that Congress considered the specific question at issue. In the absence of aid from judicial precedents and legislative history, we are driven to determining whether Sun's construction of Section 2(b) is more meaningful and more in harmony with the purposes of the Act than the Commission's construction. This determination requires us to weigh the disparate effects of the two constructions.

For an oil company marketing gasoline through filling stations owned or leased by the operators and competing with a supplier-retailer, the practical effect of adopting the Commission's view is to excise from the Act the defense of meeting competition.

If gasoline could be canned like tomatoes and stocked like bottled goods, and if gasoline suppliers competed with each other for the retail merchant's trade, the Commission's reading of Section 2(b) would be more realistic and more reasonable than is here presented. But the nature of gasoline, the necessity for its bulk merchandising, the responsibility of the refiner or supplier for advertising, the dependent relation of the supplier on its dealers and the dealers on a single supplier make it a "fiction", or something less substantial than a legal fiction, "to speak of price competition at the oil company sale to the station

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[20] Considering the difficulty of defining "competitor," "injury to competition," and "meeting competition in good faith," the Robinson-Patman Act may have the virtue Savigny ascribed to Roman law: "the excellence of a Roman law lay in its being neither too plain nor too obscure, but expressed in a sort of middling obscurity. 'Auf einem schmalen Raume mittelmassigen Dunkelheit.'" Quoted in Curtis, A Better Theory of Legal Interpretation, 3 Vand. L. Rev. 407, 421 (1950).

level".[30] An oil company's product competes with the products of other refiners or suppliers in the motorists' market—through dealer outlets.[31] And, no oil company can stay alive if it loses its dealers.

The gas station retailer is a rare bird among retail merchants. His business is built around pumps which can be used only for his supplier's gasoline.[32] Sun sells Sunoco in pumps that say "Sunoco". Its competitor at 19th and Pearl in Jacksonville, Super Test, sells its gas in pumps that say "Super Test". Sunoco gasoline flows unchanged from Sun through Sun pumps to motorists. Sun, not some small retailer, bears the primary responsibility of advertising and for puffing Sunoco against Super Test and other gasolines even though the sales which are competitive take place at the consumer level. McLean's losing fight for survival, therefore, was a lost battle in a long war between Sunoco and Super Test gasoline and be-

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[30] *Enterprise Industries, Inc.* v. *The Texas Co.*, 136 F. Supp. 420, 421.

[31] "Most of the evidence seems clearly to demonstrate that a company offers discounts because its dealers are losing business to price-cutting competitors; since the major suppliers compete among themselves and with independents primarily *through* their dealers, the concessions are made in a very real sense in good faith to meet competition. Furthermore, there is little evidence—and certainly none so far in these cases [Enterprise and the instant case, then before the Commission]—that the discriminations complained of put a halt to price competition, or even threatened to do so. On the contrary, dual distribution and discriminatory price concessions seem to have contributed on balance to the intensity of price competition, where their effects have been visible." Integration and Competition in the Petroleum Industry, DeChazeau and Kahn, 480, (1959).

[32] This practice does not violate Section 3 of the Clayton Act. *FTC* v. *Sinclair Refining Co.*, 1923, 261 U.S. 463, 43 S. Ct. 450, 67 L. Ed. 746.

tween Sun and Super Test, suppliers, each out to increase its share of the motorists' trade.

As Mr. Justice Jackson has pointed out: "Retailers' storage capacity usually is limited and they are in no position to accumulate large stocks. They can take gas only when and as they can sell it".[33] The suppliers therefore, must maintain gasoline stocks to meet the needs of the ultimate consumer—the motorist; and a service station, therefore, primarily is what the word indicates—a *service* station. In gasoline marketing the supplier simply cannot be cut off from the filling station operator and treated as if it competed only for the business of filling stations; oil companies compete with each other for the consumer's business.[34]

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[33] Dissenting opinion, *Standard Oil Co. v. U.S.*, 337 U.S. 293, 323.

[34] "The legislative history of the Robinson-Patman Act discloses that one of the major dissatisfactions with original Section 2 of the Clayton Act was the belief that it was confined to cases where the effect of a price discrimination was on competition among sellers. The Robinson-Patman Act modified a number of provisions of old Section 2, including both the competitive effect and meeting competition clauses. The modified provisions are distributed between the newly created subsections (a) and (b).

There is no reason to suppose that when the prohibition was amended to include discriminations having adverse effects upon buyers, the failure to express a corresponding change in the meeting competition defense was anything more than the type of inadvertence which is the hallmark of the statute. For it is clear that the defense was intended to be correlative with the offense. Nor has any reason of policy been suggested for creating an imbalance between the prohibition and the justification. If the occasion for meeting competition exists, the validity of the defense should not depend on the hierarchy in the scheme of distribution at which competition is met. A multi-tiered condemnation requires a multi-tiered defense." Steed, Antitrust Problems Under Price War Conditions, Southwestern Institute on Antitrust Laws, 77, 99 (1958). Wright, Vice-President and Sales Manager for Sun testified: "In this

The filling station operator is a conduit between the supplier and the motoring public. As Mr. Justice Jackson observed:

> But the retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. * * * The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged.

The Commission centers its argument on the contention that Sun reduced its price to McLean "to favor a particular customer in order to help that favored customer meet his competition." It is true that McLean was in a direct competition with the Super Test station across the street. It is true that he was in distress. But there is nothing in the record to show that any Sun official beat his breast over the personal plight of *Gilbert* v. *McLean*. On the contrary, the record shows that Sun reduced its price to McLean—to help itself; to meet low prices that were inducing motorists to buy Super Test instead of

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setup the dealer actually is a conduit between the supplier, enjoying the patronage of the motorist, and the motorist and in essence they become, the dealer and the supplier become, a team of which the supplier and not the dealer assumes the major responsibility for promoting and guiding competition within the area * * *. Now, it is not the service station operator, due to the limited facilities available, who is able to supply the repeated demand for gasoline, but it is the supplier who assumes that responsibility. Service stations are just too small to permit more than a few days' supply of gasoline * * *. We were competing with the station as a retailer of Super-Test gasoline for the business of the motorists residing or working near that location, 19th and Pearl, and who would find it convenient to stop at that station."

Sunoco gasoline. Keeping McLean in business at 19th and Pearl was keeping Sun in business at 19th and Pearl and preserving Sun's share of the market in the Jacksonville area.

An unfortunate result of narrowing the scope of Section 2(b) is that it takes flexibility out of a defense that ought to be flexible and dependent on individual competitive situations. Here the Commission gives no consideration to the fact that Super Test was a supplier-retailer. The Commission's sole criterion is whether Sun's price to McLean is lower than Sun's price to other dealers. The result is doubly unfortunate when the price-cutting supplier is a vertically-integrated company. The natural effect of the Commission's holding will be to push already highly-integrated majors into combining direct retailing with their other operations—*to the detriment of non-majors, such as Super Test, as well as to the detriment of filling station operators.*

One of the purposes of the Robinson-Patman Act was to promote local ownership, protect the small, independent merchant, and reduce the trend toward monopoly.[35] Congressman Patman stated that the bill

[35] The Clayton Act was primarily intended to prevent predatory practices of large sellers whose selective price-cutting, often below cost, enabled them to kill off smaller competitors. The Robinson-Patman Act was in good part the outgrowth of the FTC's investigation of chain stores. The primary purpose of the Act was to prohibit quantity discounts by large sellers where there was no cost saving attributable to the quantity sales. FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935); S. Rep. No. 1502, 74th Cong., 2nd Sess. 4 (1946). See Austin, Price Discrimination and Related Problems under the Robinson-Patman Act 5–11, 93–96 (Amer. L. Inst. 1959); Rowe, Evolution of the Robinson-Patman Act, 57 Col. L. Rev. 1059, 1061 (1957); Palamountain, The Politics of Distribution chap. VII (1955); Rowe, Price Discrimination, Competition and

was "designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves and the manufacturer from whom he buys, from exploitation by his chain competitor." 79 Cong. Rec. 9078. "The primary remedial objective of the Robinson-Patman amendment of the Clayton Act, therefore, was the protection of the smaller independent merchants from injury to their competitive position resulting from discriminatory advantages extended by manufacturers and producers to mass distributors who were using their concentrated buying power to demand and obtain price concessions and preferential allowances and services. Whereas Section 2 of the original Clayton Act was aimed at predatory practices of powerful sellers directed at elimination of *their* weaker competitors, the Robinson-Patman Act was designed to curb the predatory use of bargaining power by chain stores and other large buyers and to preserve the independence of the small merchant as a factor in his local community." Austin, Price Discrimination Under the Robinson-Patman Act, p. 11 (American Law Institute, 1959). Here, ironically, the Federal Trade Commission, swept on inexorably by the logical necessities of its barren logic, finds itself in the unnatural role of fostering vertical inte-

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Confusion: Another look at Robinson-Patman Act, 60 Yale L. J. 923 (1951); Fielda, Food Distribution in the United States, 99 U. of Pa. L. Rev. 1051 (1951); Machlup, Characteristics and Types of Price Discrimination 397, 412 (1955); Dirlam & Kahn, Fair Competition 206 (1954). Authorities on the origin and legal impact of the Act are collected in footnotes 5 and 6 of Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 664 Yale L. J. 1, 2 (1959).

gration at the expense of the small, independent filling station retailer.[36]

The Commission's construction gives the vertically-integrated company a competitive advantage based on the legal effect the Commission attaches to integration of retailing operations rather than on such economic factors as efficiency of merchandising, of distribution or of performance. This is not the case of an aggressive retailer, such as a supermarket, having an established policy of doing a high volume business on a low margin, consistently emphasizing price over service. As the Commission sees it, without regard to the economics of merchandising gasoline, a supplier-retailer, large or small, may with impunity undercut the retail outlet of a competing supplier. The undercut supplier may not resort to defensive tactics such as price allowance to his established outlet that in part (here, 1.7 cents) protects his dealer and himself against sporadic predatory raids.

How may a supplier protect itself in such a case? First, as the Examiner, perhaps with tongue in cheek, suggested, Sun could change its system of distribution, integrate its retail outlets, and sell directly to motor-

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[36] "Moreover, by narrowing the scope of section 2 (b), the decision aggravates the effect of price wars on retailers who are forced to cut their prices to maintain their volume of sales. * * * [Such a decision's] sole effect is to prohibit suppliers from lowering their wholesale prices to help their retailers meet a competitor's price cut. While this may prevent retail prices from being driven as low as might otherwise occur, the full amount of these price cuts must now come out of the dealer's profit margin. And since the ability of the retail dealer to meet price cuts normally acts as a deterrent to aggressive price-cutting * * * [such a decision] may even tend to encourage such practices." Note, The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 941-942.

ists through stations the company owns and operates.[37] Second, as of course the Examiner did not suggest but implicit in the suggestion, is the alternative that Sun withhold help to a filling station in distress and put the entire burden on the individual dealer—an intolerable burden, for, as this case demonstrates, an individual retailer cannot survive a price war with a company that has integrated wholesale marketing and retailing. The retail dealer operating his own filling station works on such a thin margin that the slightest cut slices to the bone, and his resources are not large enough to enable him to hold out for the duration of any long drawn out price war. A large margin makes him an easy prey to an aggressive competitor. The effect of the Commission's holding, therefore, is to bury the small, independent filling station retailer—whether the supplier takes over the ownership and operation of all its stations or, putting the entire burden on the dealer, the supplier takes no action. This dilemma and its implications could not and did not escape the attention of the Examiner or the Commission. The Examiner made—and the Commission approved—the suggestion, one that is somewhat more than banal, that if Sun should choose not to meet competition from Super Test by operating its own stations, a course of action naturally repugnant to the

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[37] The examiner's opinion, adopted by the Commission, states:

"It is true, of course, as respondent argues, that where one or some of its dealers are faced with ruinous price competition respondent must take some action or suffer the loss of such dealership and respondent's competition with its own competition, but of course this is not the law and cannot justify price discriminations injuring others. Respondent could, if it chose to, meet such competition at the dealer level by nondiscriminatory reductions in price to all dealers, or by operating its own stations and thus being in direct competition with other stations which reduce prices."

Commission, Sun could meet "competition at the dealer level by non-discriminatory reductions in price to all dealers". In other words, to avoid the dilemma and to meet competition on the corner of 19th and Pearl streets in Jacksonville, Sun, perhaps ruinously, would have to reduce its price to all of its dealers in the United States.[38] Or, assuming that the suggestion means "all dealers" in Jacksonville—in context it is not so limited—and assuming also that such price reduction would not run afoul of Anheuser-Busch,[39] the Commission would have Sun enlarge the scale of the price war and risk a chain-reaction that might set off price wars throughout Florida and Southeast United States. In either case, other oil companies, majors and non-majors, would have to meet Sun's price-cuts thereby spreading price wars and subjecting the margins of filling station operators to further compression.

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[38] The Supreme Court has said that the Robinson-Patman Act does not require a seller to choose "between ruinously cutting its price to all customers * * * or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 250 (1951).

"The characteristic unwillingness of large national sellers to experiment with price changes will certainly be intensified if any reduction must be made in all submarkets, and oligopolistic industries will therefore be deprived of an important source of price flexibility." Comment, Competitive Injury Under the Robinson-Patman Act, 74 Harv. L. Rev. 1597, 1603 (1961). See also Dean, Managerial Economics 458 (1951); Machlup, The Economics of Sellers Competition 465 (1952).

[39] As noted in the Comment, Competitive Injury Under the Robinson-Patman Act, 74 Harv. L. Rev. 1597, 1599, "The cease and desist order [in Anheuser-Busch] prohibiting reductions unless proportionately made in all markets, did not disturb the preexisting patterns of geographic variation that had been characteristic of the company's price behavior."

Sun's restraint in taking no defensive action for four months and in giving a discount only to McLean had at least the merit of attempting to localize a disruptive price battle. Extension of similar discounts by other major suppliers and by Sun, on an area basis, promptly resulted in a price war in the area.[40] But suppose that a supplier in Sun's situation should decide that an across-the-board tank-wagon price reduction to meet competition at one location is irrational, bad business management, and more than likely to bring on a general price war. Then, if the Act must be construed as forbidding a supplier's making a price allowance to a retail outlet in distress—the effect is to freeze the price level of major brands of gasoline and to promote rigid resale price maintenance.[41]

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[40] The record shows that in March 1956 virtually all of the stations in Duval County sold gasoline at reduced prices. The gallonage for the county increased 28.5 percent over the gallonage for January.

For a case study of a price war in Philadelphia that arose from a competitive situation similar to the situation in the present case and also involved Sun, see Note, Competition in Gasoline Retailing: A Price War, 101 U. of Pa. L. Rev. 647 (1953).

[41] A practice of tailoring tank-wagon prices to meet individual competitive situations tends to reduce the effectiveness of the resale-price-maintenance characteristics, such as they are, of a major's pricing policy. The Commission's holding has the opposite effect since it tends to make for uniformity and rigidity in resale prices. Cf. Adelman's thesis: "The Act inhibits competition in the name of protecting competition." Adelman, The Consistency of the Robinson-Patman Act, 6 Stanford L. Rev. 3 (1953). See also Edwards, Maintaining Competition 159–71 (1949); Resale Price Maintenance and the Anti-Trust Laws, 18 U. of Chi. L. Rev. 369 (1951); The Swinging Door—Or How to Obey One Anti-trust Law by Violating Another, 59 Yale L. J. 158 (1949); The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised, 66 Yale L. J. 935, 944 (1957).

Imprecise language in the Robinson-Patman Act, policy divergencies between that Act and the Sherman Act, and the interrelation of integration and competition in the petroleum industry make it difficult for the Commission and the reviewing court to apply Section 2(b) with certitude as to the correctness of its application to the issue for decision. The Commission itself has changed sides on the issue.[42] We have reached the conclusion that in this case the Commission's construction of Section 2(b): violates the policy of the Act that places emphasis on individual competitive situations; focuses on injury to particular competitors rather than on the health of the competitive process; conflicts with the purpose of the Act to protect the small retailer; fosters vertical integration of retailing operations, jeopardizing the future of the non-major as well as the independent filling station operator; discourages sound marketing in that it confers a competitive advantage on a supplier gaining trade by sporadic predatory low prices unrelated to economic factors, in the sense that a high-volume low-margin policy of a super-market is related to such economic factors as low-cost efficiency of operation and the maximization of over-all profit; denies the realities of the market place in refusing

[42] The position taken by the Commission in this case represents a shift in its views. Before 1956 the Commission held that price allowances such as Sun made to McLean enjoy the protection of the defense of meeting competition. See testimony of Gwynne, Chairman, FTC, before Senate Committee on the Judiciary, Subcommittee on Antitrust and Monopoly, "To Amend Section 2 of the Clayton Act" Hearings, 84th Cong., 2d Sess. (1956), p. 229–232; cf. ibid., p. 89–92. In 1956 the Senate Sub-Committee on Retailing, Distribution and Fair Trade endorsed views similar to those now held by the Commission. S. Rep. No. 2810, 84th Cong., 2d Sess. 20, 28–29 (1956).

to accept the undeniable fact that a supplier of gasoline competes with a supplier-retailer at the consumer level through filling station operators; tends to spread rather than localize price wars; and makes it impossible, as a practical matter, for a supplier to defend one of its filling stations, fighting for survival, or even to defend itself against destructive price raids of a supplier-retailer. Section 2(b) should not be read so narrowly as to produce effects so out of line with national policy. These effects may be avoided, in keeping with the spirit of the law and within the letter of the law, by a broad and simple construction: under Section 2(b) a supplier may be in competition with a supplier-retailer. Here, a supplier selling gasoline that is in competition with the gasoline of a supplier-retailer and marketing its gasoline through an independent filling station that is in direct competition with a filling station owned and operated by the supplier-retailer is in competition with that supplier-retailer and entitled to assert the defense of meeting competition in good faith.

II

The examiner held that even if Sun could assert the Section 2(b) defense, Sun failed to satisfy the statutory requirements of the defense for two reasons. First, Sun's allowance to McLean was not to meet competition, but to undercut Super Test's price.[13] Second, Sun and McLean entered into an

[13] One of the anomalies created by the Robinson-Patman Act is the doctrine that the primary test of good faith is whether the seller's lower price was made for the purpose of beating competition: that in competing for business a seller may equal a competitor's price but not go below it. *Moss, Inc.* v. *FTC*, 2 Cir., 1945, 148 F. 2d 378; *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 2 Cir., 1929, 30 F. 2d 234.

agreement to fix the resale price of Sunoco gasoline. Such price-fixing agreement destroys the good-faith defense and violates Section 5 of the Federal Trade Commission Act.

A. The examiner's holding that Sun's allowance to McLean was to beat competition rests on the fact that the allowance of 1.7 cents was to enable McLean to post a price of 25.9 cents a gallon for Sunoco, a price then only one cent above the price of Super Test. This holding is a complete reversal of the views the examiner expressed during the hearing." The Commission did not discuss the point in its opinion; it did, however, adopt the findings and conclusions of the examiner.

The examiner was right the first time. (1) There is evidence in the record supporting the contention that the usual price differential between a major's regular gasoline and a non-major's regular gasoline is two cents. The examiner found, however, and the record supports the finding, that: "There is also considerable evidence in the record that the price differential between the two is frequently one cent a gallon. Suf-

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"Near the end of the hearing, the examiner commented: "[The Commission said] nothing in the complaint about fixing a price or cutting the price to within one cent of the competition * * *. If you had an allegation that by fixing a price, by cutting the price or maintaining the price within one cent of the Super-Test price in order to drive Super-Test out of business or harm competition or unduly suppress competition, as you have in the *Pure Oil* case, then it would be entirely relevant to prove that, and it would first be necessary as a basis for that to prove that one cent would have had the effect, as you are attempting to do in the *Pure Oil* case. * * * On the [Commission's] theory anyone who cuts a price to compete is violating the law and we would have uniformity of price throughout the country, which is exactly what we do not want. * * * I do not think the one-cent differential has anything to do with the case."

fice it to say that there is not sufficient reliable probative, and substantial evidence in the record to establish what, if any specific amount, is the usual and customary difference between major and non-major regular brands of gasoline." This of course bears importantly on the question of Sun's good faith in meeting, not undercutting, Super Test. (2) In holding that Sun's allowance of 1.7 cents to permit a posted price of 25.9 cents was to beat competition, the examiner relied on McLean's testimony that he was not hurt competitively by a two cents spread. But this conclusion assumes that Super Test had an established, relatively stable pricing charge of 24.9 cents. The record shows, however, that Super Test had a bouncing ball pricing policy. The price had dropped as low as 21.9 and 20.9 cents a gallon. October and November prices were fairly stable but from December 1 on, it was beyond human knowledge to say what Super Test's price might be at any particular time and how long the price would stay put." In response to a question from the examiner as to how he arrived at 25.9 cents, McLean testified that he thought it was "to keep the two cents differential". Shortly after December 27, when McLean cut his price, Super Test cut its price to 23.9 cents. Notwithstanding the unpredictable ups and downs in Super Test's prices in December, January, and February, McLean made no attempt to maintain a one cent differential or to ask Sun for any further allowance. February 16 Super Test cut its price to 22.9 cents.

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[2] On December 1, 1955 Super Test regular gasoline was priced at 26.9 cents a gallon. December 4 it dropped to 21.9. December 5 it went back to 26.9. December 12 it was down again to 21.9. December 13 the price started at 26.9 then dropped to 21.9. December 17 it was again 26.9. December 27 it was 24.9. January 3, 1956, it dropped to 23.9. February 16 it went to 22.9 and February 28 to 19.9.

Two days later McLean went out of business. We point out, too, that in view of Super Test's practice of giving savings stamps, worth about one cent a gallon, the actual spread exceeded the apparent differential. It seems to us that in view of this nervous and erratic pattern of irregular prices, Sun's allowance of not quite two cents and McLean's choice of 25.9 cents were about as fair and reasonable a meeting of competition as anyone could expect. (3) In reaching this conclusion, we have also considered, as evidence of good faith, Sun's restraint over a long period of provocation and Sun's diligence in attempting to collect and evaluate the facts before taking any defensive action.

B. The examiner concluded, again reversing the view he held during the hearings,* that Sun and McLean entered in a price-fixing agreement or understanding. Price-fixing is per se unlawful. *United States* v. *Socony Vacuum Oil Co.*, 1940, 310 U.S. 150, 223. We recognize that direct proof of such agreement is not necessary, and that the Commission is charged with fact-finding. But the difficulty of proving an "understanding" and the acceptability of circumstantial evidence as proof do not justify relaxing the requirement that substantial evidence must support the Commission's findings and conclusions. As we read the record as a whole, there is no substantial evidence to support the Commission's finding of a price-fixing agreement. McLean, testifying a year

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* The examiner stated that the argument of the Commission did not "make sense." He said: "[Y]ou then jump to the conclusion that they must have agreed to fix the price because the price was a one-cent differential but that might just as well have been a unilateral decision on the part of McLean or a unilateral decision on the part of Sun, if they controlled the price, as you claim. That would not be any evidence of an agreement between Sun Oil and McLean."

after he had been forced out of business, apparently not actuated by any love for Sun, unequivocally stated that he had no agreement or understanding with Sun as to his retail price."[17] Sun's regional manager and sales manager, who handled the allowance to McLean, were subjected to rigorous cross-examination. They testified that Sun does not fix the retail price for its dealers, and did not have an agreement or understanding with McLean as to his resale prices. He could post any price, and 25.9 was the price he selected. Two of the four Sun dealers allegedly injured did testify that McLean told them that he was "very dis-

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[17] McLean testified:

"Q. What kind of an understanding did you have with Sun Oil Company leading up to them giving you this price adjustment?

"A. Well, I think I had been after them to get that price adjustment and on that day—I was closed for one or two days—and that day the salesman came around, Mr. Harper, and he said—I was talking to him about it and he said if it continued, if they dropped again, Super Test dropped again, that they would try to do something about it.

"He stayed around, I guess, 30 minutes or an hour and then he went off and on that day they did drop their prices and they gave me an adjustment and I dropped mine.

"Q. Now, is that all—what were you required to do if anything to get the adjustment?

"A. To take a cut."

* * * * *

"Q. I will ask you this, then: Weren't you required to do something to obtain that?

"A. To obtain that price?

"Hearing Examiner Piper: Yes.

"A. No, I dropped my gas but I wasn't required—I didn't have no agreement with them as far as lowering my price or raising my price or anything. There was no agreement made.

"Q. Was there anything said to you about reducing your margin of profit?

"A. Yes my margin of profit was reduced."

satisfied with the arrangement", but they refused to state that he had told them that he had an agreement with Sun or that Sun required him to fix a price of 25.9 cents.

The inference of price-fixing is based, as the examiner phrased it, on McLean's "testimony that he was required to take a cut in prices ['and drop his retail price to 25.9'] * * * in order to secure the discount of 1.7 cents per gallon from [petitioner]." The record shows, however, that the arithmetic of the situation, not Sun, required a discount of 1.7 cents and compelled McLean to take a cut of 1.3 cents, if he wished to post a price of 25.9 cents and still keep a bare subsistence margin of 3.5 cents above the tank-wagon price. That is what McLean was trying to say when he talked about being "required" to take a cut and having his margin of profit "reduced." He had no difficulty in making it clear that there was no agreement, no *quid pro quo,* and he saw no inconsistency in his testimony. When Sun finally lowered its tank-wagon price to McLean, it is fair to assume that Sun would not have done so, if McLean had intended maintaining his price of 28.9 cents a gallon. Such an arrangement would have given him a margin of 6.5 cents, clearly an unjustifiable preference over other Sun dealers.

This is a long way from a price-fixing agreement.

For the foregoing reasons, we set aside the Federal Trade Commission's cease and desist order issued against Sun Oil Company January 5, 1959.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

OCTOBER TERM, 1959

No. 17,658

SUN OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

Before JONES, BROWN and WISDOM, *Circuit Judges*

Judgment

This cause came on to be heard on the petition of Sun Oil Company for review of an order of the Federal Trade Commission issued on January 5, 1959 in Docket No. 6641, and was argued by counsel;

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, set aside.

July 24, 1961.

Issued: September 13, 1961.

A true copy:

Test:

EDWARD W. WADSWORTH,
Clerk,
U.S. Court of Appeals, Fifth Circuit.
By CLARA R. JAMES,
Deputy.

NEW ORLEANS, LOUISIANA, *September 13, 1961.*

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: JOHN W. GWYNNE, *Chairman*, ROBERT T. SECREST, SIGURD ANDERSON, WILLIAM C. KERN, and EDWARD T. TAIT.

Docket No. 6641

IN THE MATTER OF SUN OIL COMPANY, A CORPORATION.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of the respondent from the initial decision of the hearing examiner and upon the briefs filed in support of and in opposition to the appeal and oral argument of counsel; and

The Commission having rendered its decision denying the appeal and adopting the findings, conclusions and order contained in the initial decision:

It is ordered, That respondent Sun Oil Company shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist contained in the aforesaid initial decision.

By the Commission.

[SEAL] ROBERT M. PARRISH,
Secretary.

Issued: January 5, 1959.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners: JOHN W. GWYNNE, *Chairman*, ROBERT T. SECREST, SIGURD ANDERSON, WILLIAM C. KERN, AND EDWARD T. TAIT.

Docket No. 6641

In the Matter of SUN OIL COMPANY, A Corporation

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

In Count I, complaint charges respondent with a violation of Section 2(a) of the amended Clayton Act in the sale of gasoline to one customer at prices substantially lower than prices charged competing customers, with resulting injury. In Count II, respondent is charged with a violation of Section 5 of the Federal Trade Commission Act by conspiring with such favored customer to fix and maintain the retail price at which such customer sold gasoline at his filling station. The hearing examiner found against respondent on both counts and entered his order accordingly. Respondent has appealed.

COUNT I

Respondent is engaged, among other things, in the sale and delivery by tank wagon of gasoline to independent filling station operators. The alleged favored customer and coconspirator, Gilbert B. McLean, during 1955 and part of 1956, operated a filling station under contract with respondent at the intersection of 19th and Pearl Streets, Jacksonville, Florida. In June, 1955, the Super-Test Oil Company, selling a non-major or private brand of gasoline (as distinguished from the gasoline sold by McLean under

the brand of a major supplier), opened a new service station across the street from that operated by McLean. From its opening until December, 1955, the price usually posted by Super-Test for its regular gasoline was 26.9¢ per gallon, although on occasion, its price was lower and even as low as 21.9¢ per gallon.

The competition of this new station in selling its gasoline at substantially reduced prices caused injury to McLean who was selling at 28.9¢ per gallon, and he appealed to respondent for help. On December 27, 1955, Super-Test dropped its price to 24.9¢ per gallon. Respondent then agreed to give McLean a discount of 1.7¢ per gallon on tank wagon price and McLean dropped his price to 25.9¢. Respondent did not give a similar allowance to any other retail dealer in the Jacksonville area. This difference in price continued until February 16, 1956, when a major price war involving various other companies broke out in Jacksonville and all dealers of respondent were given a price which was the same for all.

Respondent first challenges the sufficiency of the evidence to support the findings of the hearing examiner as to Count I in the following particulars:

1. That the respondent discriminated in price between customers who were competitors within the meaning of the statute.

2. That the difference in price was of such a character as to create a probability of substantially lessening competition.

Considerable evidence was introduced on these propositions. It is reviewed at some length in the initial decision and will not be repeated here. Generally, it consists of:

1. Figures showing increase or decrease in the gallonage of certain affected stations.

2. Evidence as to the loss of specific customers.

3. Geographic details as to location of stations and streets and highways and other facts which might influence buying habits of customers.

On the subject of gallonage, the hearing examiner found that McLean's sales of gasoline were as follows:

	Gallons per month
August, September and October, 1955	6,500
November, 1955	5,900
December, 1955	8,300
January, 1956	32,100

Daily sales until February, 1956, when McLean quit business, averaged approximately the same as January.

The sales of Calvin Peery, who sold respondent's gasoline at 28.9¢, and whose station was less than a mile from McLean's, were as follows:

	Gallons per month
December, 1955	10,900
(which was approximately his monthly average for the last six months of 1955)	
January, 1956	9,300

Jesse McClung, also selling respondent's gasoline at 28.9¢ and whose station was about a mile distant from McLean's also, according to the hearing examiner, sold a substantially lesser amount of gasoline on an average basis for the first two weeks of January, 1956 than he did in the previous month.

William Crabtree's Sun Station, about 2½ miles from McLean's sold about 17,000 to 18,000 gallons per month during the last four months of 1955 and 14,500 in January, 1956.

Clair Winning, operating a Sun station about 3½ miles from McLean's, did not lose gallonage in January. After February 16, 1956, when he received the general price reduction previously referred to, his gallonage increased from 410 gallons on one day to 903.

As against these figures, respondent introduced figures from the Florida Tax reports indicating a decrease in total gasoline sales in Duval County (roughly the same as Jacksonville) from December, 1955, to January, 1956, of 6.8%. Respondent's appeal also calls attention to other evidence. For example, McClung's faulty records (for which the hearing examiner made due allowance in evaluating his testimony); the fact that Peery did not keep his station open on Sundays in January, 1956 (a fact also true of December, 1955); Crabtree's working at the Post Office (although his station was operating as usual).

These circumstances have all been considered but we believe they do not explain the changes in gallonage figures as previously pointed out.

Secondly, all the station operators above named were called as witnesses and gave instances of loss of specific customers. For example, Crabtree saw some of his former customers buying gas at McLean's station and heard from them that it was because of the cheaper price. Winning identified four customers by name and address who abandoned him because of the cheaper price at McLean's. Furthermore, some of these station operators testified that they complained to respondent that they were losing business because of this discriminatory pricing and asked for a reduction in price similar to that given McLean.

The situation disclosed by the record is similar to that considered by the Commission and the courts on several occasions. See, for example, *Federal Trade Commission* v. *Morton Salt Company* (1948) 334 U.S. 37; *In the Matter of Sorensen Manufacturing Company* (1956), Docket No. 6552.

Here, we have a number of small independent retailers selling an identical product at the same price and under substantially the same conditions. All were operating at a small margin of profit and in an

area which was a reservoir of potential customers who, because of the geographic situation, had easy access to that dealer who offered an advantage in price or in services rendered. When such a situation is shown to exist, together with proof that one competitor received a discount from a common supplier, an inference of injury to the others may reasonably be drawn from that fact. Even where other evidence showing injury is presented, this inference may be considered in addition to other proof. The question involved has to do with the inference which may properly be drawn from admitted or proven facts and not with the burden of proof. Although *Samuel H. Moss, Inc.* v. *Federal Trade Commission* (1945), 148 F. 2d 378, is often cited to the contrary, the weight of authority is to the effect that counsel supporting the complaint has the burden of proof to establish the necessary injury. See *In the Matter of General Foods Corporation* (1954), 50 Federal Trade Commission Decisions 885.

In spite of certain statements made in the initial decision, the hearing examiner stated: "As found above with respect to Peery and McClung and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination."

We agree with this finding.

The respondent next argues that the hearing examiner erred in failing to find that the respondent had established in fact and as a matter of law the defense of good faith meeting of competition within the proviso of Section 2(b) of the amended Clayton Act, which provides:

> *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in

good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

The discount given by respondent to McLean was not made to meet a lower price made to the latter by another supplier. It was given to enable McLean to meet the competition of the Super-Test station across the street. Respondent would justify broadening the proviso of Section 2(b) to cover this situation on the theory that respondent and its dealer McLean were, in fact, competing as a unit with other channels of competition.

As pointed out by the hearing examiner, this argument goes beyond the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer. This construction of the proviso was upheld in *Enterprise Industries, Inc.* v. *The Texas Company* (1955), 136 Fed. Supp. 420 (reversed on another ground).

COUNT II

Prior to December 27, 1955, when Super-Test cut its price, McLean did not make any reduction. However, on several occasions, he talked to representatives of respondent and was advised they could do nothing about it. It does appear, however, that its officials were giving consideration to the matter. On December 27, 1955, Super-Test dropped its price to 24.9¢. On that same day, Harry Harper, a salesman for respondent, called at the McLean station and advised McLean that he would get a reduction of 1.7¢ per gallon.

Direct evidence as to what was said on this occasion is found in the testimony of McLean. There is some conflict in this testimony. The hearing examiner concluded that Harper advised McLean "that he would be given a price adjustment of 1.7¢ per gallon if he

would absorb 1.3¢ himself and drop his retail price to 25.9¢."

The hearing examiner had the opportunity to observe the witnesses as they testified. His conclusions as to the weight to be given their various statements should be given proper consideration by the Commission. *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474; *Folds* v. *Federal Trade Commission* (1951) 187 F. 2d 658.

There are other facts in the record that support the hearing examiner's conclusion. For example, it appears that in order to compete with Super-Test, McLean needed only a 2¢ margin which, of course, would have given him a larger margin of profit. Crabtree and McClung both testified that McLean indicated dissatisfaction with the arrangement with respondent and that McLean told them that he was selling a lot of gas, doing a lot of work, but not making much profit. On or about February 18, 1956, McLean went out of business.

These facts lend support to the view that in posting his price, McLean was complying with an agreement, rather than acting as a free agent.

Secondly, Harry Harper was not called as a witness nor was any reason given for failure to do so. That this is a circumstance to be considered is well settled. *Runkle* v. *Burnham* (1894) 153 U.S. 216; *Local 167 International Brotherhood of Teamsters* v. *United States* (1934) 291 U.S. 293.

Robert H. Gravette, Jr., an examiner for the Federal Trade Commission, testified as to a conversation he had with McLean in which the latter told of a telephone conversation on December 27, 1955, with someone representing respondent, who said: "If you lower the price of gasoline in your station by 3¢, we will give you a promotional allowance of 1.7¢ per gallon;

that McLean reported he agreed and reduced his price accordingly.

It is not disputed that respondent knew of McLean's competitive problem and did give him a 1.7c reduction and that McLean thereafter reduced his price. The question to be determined is whether that reduction (either expressly or by implication) was conditioned on the posting of a certain price by McLean.

It is well known that conspiracies are often not capable of proof by direct testimony and may be inferred from the things actually done and from the circumstances. *Bausch Machine Tool Company* v. *Aluminum Company* (1934) 72 F. 2d 236, 15 C.J.S. 1043, et seq.

The situation here is somewhat similar to that in *Eastern States Lumber Association* v. *United States* (1914) 234 U.S. 600, involving a conspiracy to violate the Sherman Act. There it was shown that members of a retail lumber dealers association collected information about wholesalers who also sold direct to consumers,—a practice in disfavor with retail dealers. The names of such wholesalers were made available to all members of the Association. There was no direct proof of any agreement among retailers to refrain from dealing with these wholesalers. The court held that, nevertheless, such agreement would be inferred. There is direct testimony as to the agreement. The conclusion that it amounted to a price fixing agreement is substantially supported by the circumstances as shown in the record.

Respondent also contends that even if an agreement were made as to price, it was, nevertheless, legal under the McGuire Act which permits agreements between a seller and a buyer prescribing minimum or stipulated resale prices under certain conditions, when such agreements are lawful under any statute, law or pol-

icy in effect in the jurisdiction in which such resale is to be made.

In *Liquor Store* v. *Continental Distilling Corporation* (Fla. 1949), 40 So. 2d 37, the Supreme Court of Florida declined to enforce the resale agreement on the ground that it was arbitrary and unreasonable and contrary to the public policy announced by the Florida Constitution and statutes. In *Miles Laboratories, Inc.* v. *Eckerd* (1954), 73 So. 2d 680, after the adoption of the McGuire Act, the Court arrived at the same conclusion. Although both of these cases had to do with "non-signers", the decisions were not put on that ground. (For comment on these decisions, see note in 19 ALR 2d 1139, and *Shakespeare Company* v. *Lippman's Tool Shop Sporting Goods Company* (Mich. 1952), 54 N.W. 2d 268.) In *Sunbeam Corporation* v. *Masters of Miami* (1955), 225 F. 2d 191, the Federal Circuit Court of Appeals for the Fifth Circuit, in commenting on the "strong and consistent declarations of the Florida Supreme Court to the effect that the public policy of Florida is opposed to price maintenance" had this to say:

> We think it may well be that Fair Trade contracts are unenforceable in Florida even between the parties; however, it would seem that this is unnecessary in our decision here and we do not decide that question.

That case also involved non-signers.

The McGuire Act covers agreements "prescribing minimum or stipulated prices". In this respect, it differs from the Miller-Tydings Act which has to do only with minimum prices for resale. Each statute immunizes certain agreements from attack under the Sherman Act but only to the extent that such agreements are lawful in the jurisdiction where the resale is to take place.

The Florida Fair Trade statute provides that a contract relating to the sale or resale of a commodity may lawfully contain a provision "that the buyer will not resell such commodity at less than the minimum price stipulated by the seller". Thus, the authority granted in regard to resale contracts is more limited than that contained in the McGuire Act.

Prior to the adoption of the Florida Fair Trade statute, price fixing was illegal in Florida and the contract under consideration here would clearly have been contrary to law. Even though the statute be considered to be Constitutional and enforceable as to parties to the agreement, it affords exemption from the general laws against price fixing only to the extent provided in the Act, that is, as to the establishment of a minimum price for resale. It does not give a buyer and a seller a free hand to make what contract they wish as to agreed price and thus virtually repeal the general policy of Florida against price fixing.

The agreement between respondent and McLean was not for the purpose of establishing a minimum resale price. On the contrary, it was a contract under which the parties jointly agreed to share the loss of profits incident to selling gasoline at a lower price. It was obviously not made with the Florida Fair Trade Act in mind. Nor can it derive any protection from it. Consequently, the condition laid down in the McGuire Act which is necessary for immunity from Sherman Act attack has not been met and the Act is not available to respondent.

United States v. *Socony Mobile Oil Company* (1957), 157 F. Supp. 202, cited by respondent, is not in conflict with the conclusion herein. In that case, the Court pointed out that under Massachusetts law a wholesaler or distributor has an absolute right to designate the terms of resale and that a producer of

a trade-marked article, which is of a class in open competition, may fix the price at which the retailer may sell. Consequently, the condition necessary for the McGuire Act to become effective is found to exist. In Florida, the opposite is true.

The hearing examiner also found that respondent operates some "company" filling stations in competition with its retailers and that, under *United States* v. *McKesson and Robbins Company, Inc.* (1955) 351 U.S. 305, the agreement between respondent and McLean would not be within the protected area afforded by the McGuire Act.

We agree with the conclusion of the hearing examiner that the defenses based on the Florida Fair Trade Act or the McGuire Act have not been established.

Finally, respondent claims that "the examiner's cease and desist order is unwarrantedly broad and punitive."

Similar objections have been made many times and rejected by the courts. In *Maryland Baking Company* v. *Federal Trade Commission* (1957) 243 F. 2d 716; *Federal Trade Commission* v. *National Lead Company* (1957) 352 U.S. 419; *Moog Industries, Inc.* v. *Federal Trade Commission* (1956), 238 F. 2d 43.

The findings and order of the hearing examiner are adopted as the findings and order of the Commission. Respondent's appeal is denied, and it is directed that an order issue accordingly.

JANUARY 5, 1959.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 6641

IN THE MATTER OF SUN OIL COMPANY, A CORPORATION

INITIAL DECISION

ROBERT L. PIPER, Hearing Examiner.

Rufus E. Wilson, Esq., *Ross D. Young, Jr.*, Esq., and *John B. Clayton*, Esq., for the Commission.

Leonard J. Emmerglick, Esq., of Washington, D.C.; *Moffett, Frye & Leopold*, by *Henry A. Frye*, Esq., of Philadelphia, Pa.; *Rawle & Henderson*, by *Joseph W. Henderson*, Esq., of Philadelphia, Pa.; and *Osborne, Copp, Markham & Ehrlich*, by *Cyril C. Copp*, Esq., of Jacksonville, Fla., for respondent.

STATEMENT OF THE CASE

On September 26, 1956, the Federal Trade Commission issued its complaint against Sun Oil Company, a corporation (hereinafter called respondent), charging it with price discrimination in violation of Section 2(a) of the Clayton Act (hereinafter called the Clayton Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act, and unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondent.

The complaint alleges in substance that respondent discriminated in price by the sale of its gasoline to one dealer at prices substantially lower than the prices charged other dealers in the same market area, and that respondent entered into an agreement

with such dealer to fix and maintain the retail price at which he sold said gasoline. Respondent appeared by counsel and filed an answer admitting the corporate, commerce, competition and certain other factual allegations of the complaint, but denying any price discrimination in violation of the Clayton Act or any price-fixing agreement in violation of the Act.

Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places from February 4, 1957, to December 30, 1957.

Both parties were represented by counsel, participated in the hearings and afforded a full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof, and pursuant to leave granted presented oral argument thereon. All such findings of fact and conclusions of law proposed by parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.[1]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

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[1] 5 U.S.C. § 1007(b).

Findings of Fact

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a New Jersey corporation with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pennsylvania.

II. Interstate Commerce and Competition

The complaint alleged, respondent admitted, and it is found that it is now and for several years last past has been engaged in the offering for sale, sale, and distribution of gasoline in commerce in various states of the United States, including the City of Jacksonville, Florida, and adjacent territories. In the course and conduct of such business, respondent ships or otherwise transports its gasoline in tank cars, tankers, and trucks from its different refineries, terminals and distribution points, located in various states of the United States, to retail dealers located in the Jacksonville, Florida, area, and in various other states of the United States. All of such purchases by said retail dealers are and have been in the course of such commerce. There is now and has been at all times mentioned herein a continuous stream of trade in commerce of said gasoline between respondent's refineries, terminals, and distribution points and said retail dealers. In the course and conduct of this business, respondent is in direct and substantial competition in commerce with other corporations, individuals and partnerships likewise engaged in the sale and distribution of gasoline.

III. THE UNLAWFUL PRACTICES

The complaint contains two counts, one alleging price discrimination in violation of the Clayton Act, and the other alleging price-fixing in violation of the Act, and they are considered *seriatim*.

A. *The Price Discrimination*

The issue here framed is one of alleged secondary-line price discrimination, in that it is contended that respondent sold its gasoline to a particular dealer in Jacksonville, Florida, at prices substantially lower than respondent charged its other dealers in the same market area. Respondent's answer admitted the sale at substantially lower prices to said dealer, but denied that such dealer was in the same market area as other dealers purchasing from respondent or was in competition with such other dealers, and denied that the effect of such discrimination in price may be to injure, destroy, or prevent competition with such other dealers, or others, or that such discrimination was in violation of Section 2(a) of the Clayton Act.

The facts with respect to the price discrimination itself are substantially undisputed. Respondent had some 38 retail dealers in Duval County, Florida, which may for the purposes of this decision be characterized as the Jacksonville area, most of whom were in the City of Jacksonville itself. These dealers are independent contractors who enter into contracts with respondent concerning the purchase of respondent's gasoline and oil, and who operate filling stations at which respondent's products are advertised and sold.

During 1955, Gilbert V. McLean as such an independent contractor operated a Sun Oil filling station located at the intersection of 19th and Pearl Streets in Jacksonville, Florida. In June of 1955, the Super Test Oil Company opened a competing station at the

same intersection diagonally across from McLean's station. As established in the record, Super Test was a so-called "non-major" or "independent" brand of gasoline as compared with so-called "major" companies or "name" brands of gasoline, of which Sun Oil is one. During most of the time from June to December of 1955, the Super Test station sold its "Regular" gasoline at 26.9 cents per gallon while McLean sold his "Regular" gasoline for 28.9 cents per gallon. However, on three or four occasions between June and December of 1955, the Super Test station dropped its price substantially below 26.9, and as low as 21.9 on at least two occasions. Each time this occurred, McLean's sales of gasoline declined substantially. McLean complained several times to respondent about this situation, but nothing was done until December, 1955. During that month the Super Test station reduced its prices several times on weekends, and respondent's salesman, Harry Harper, advised McLean that if it happened again respondent would try to do something.

On December 27, 1955, when McLean was still selling his gasoline for 28.9, Super Test dropped its price from 26.9 to 24.9. The same day respondent gave McLean a price allowance or discount of 1.7 cents per gallon and McLean dropped his retail price to 25.9, thereby reducing his margin of profit by 1.3 cents per gallon, the difference between the discount and the 3-cent reduction in the retail price of his gasoline. Respondent did not give this discount or lower price to any of its other retail dealers in the Jacksonville area. Approximately seven such dealers were in the same sales territory as McLean. This sales territory was one of three in the Jacksonville area established by respondent, and consisted roughly of the north one-third of Duval County. About six of these dealers were relatively close to McLean's

station. This discrimination in price between McLean and respondent's other dealers continued until on or about February 16, 1956, when a price war broke out in the entire area and respondent reduced its wholesale or tankwagon price to all of its dealers in the area.

As a result, McLean's sales of gasoline increased substantially. In October, 1955, he sold approximately 6500 gallons, about the same as his sales in August and September. In November, 1955, he sold 5900-odd gallons, in December, 8300-odd gallons, while in January, 1956, after he reduced his price on December 27, he sold 32,100-odd gallons, almost four times as much as in December and five times as much as he averaged during August, September, October, and November. McLean's daily sales during February, 1956, until he went out of business on or about February 18, averaged approximately the same as January.

Counsel supporting the complaint called four of the Sun dealers who were in the same sales territory in Jacksonville, and the record establishes and it is found that they were in competition with McLean and adversely affected by the discriminatory price allowance granted McLean and denied them. From December 27, 1955 to February 16, 1956, they did not receive the discount given McLean and continued to sell their gasoline for 28.9 cents per gallon while McLean was selling the same product for 25.9 cents per gallon. Respondent contends that these other Sun dealers were not in the same competitive area as McLean, were not in competition with him, and therefore the granting of a lower price to McLean could not have had the effect of lessening competition or of injuring, destroying, or preventing competition with McLean. Respondent also contends that even if such dealers were in competition with McLean, counsel sup-

porting the complaint has failed to establish that the effect of such discrimination may be to substantially lessen competition or to injure, destroy, or prevent competition with McLean, the statutory prerequisites of Section 2(a) of the Clayton Act.

With respect to respondent's first contention, the record establishes the contrary. The four dealers called as witnesses in support of the complaint were Calvin Peery, William Crabtree, Clair Winning, and Jesse McClung. Peery's station was located at the intersection of 11th and Main Streets, three blocks east and eight blocks south, and less than a mile from, McLean's station. There were received in evidence as Commission's Exhibit 21-A and Respondent's Exhibit 5, maps of Duval County and Jacksonville showing the location of the various Sun stations as well as the amount of traffic flow past them. Main Street, as the name connotes, is the main thoroughfare running north and south through Jacksonville, and is also the route of U.S. 17 through Jacksonville. Pearl Street is a main artery running north and south parallel with Main Street, three blocks west of it. According to Respondent's Exhibit 5, while Main Street carries the heaviest volume of traffic, Pearl Street also carries a heavy volume of traffic, approximately one-half as much as Main Street but substantially in excess of the majority of streets in Jacksonville. Much of the traffic from the north and the northwest can proceed to the downtown area alternatively by way of either Pearl or Main Streets, and in the process pass either or both McLean's and Peery's stations, as well as McClung's and Winning's stations, to be considered hereinafter.

From December 27, 1955, until the general price reduction in February, Peery, as well as the others, paid a wholesale price of 1.7 cents per gallon more than McLean. During December, 1955, Peery sold

10,900-odd gallons of gasoline, which was approximately his monthly average for the last six months of 1955. In January, 1956, after the discount to, and price reduction by, McLean, Peery's gallonage dropped to 9300-odd gallons, a decline in excess of 1500 gallons. In fact, on only six days during January did Peery sell as much as he averaged per day during December. Peery was informed not only by Crabtree and McClung but by his own customers as well that McLean was selling Sun gasoline for three cents per gallon less. Peery complained to respondent about this and the discount to McLean but was advised that nothing could be done about it. The loss of customers, as well as the geographic proximity and pattern of traffic flow, clearly demonstrate that Peery's and McLean's stations were in competition with each other. The loss of gallonage clearly demonstrates the effect of the discriminatory allowance and reduced price.

McClung operated a Sun station at the intersection of 35th and Main Streets, east and north approximately one mile from McLean's station. There are eleven streets connecting Main Street with Pearl Street between McClung's and McLean's stations. McClung testified that most of his local trade came from west of his station, which is logical because most of the area east of his station is occupied by a large cemetery. McClung also testified that most local traffic originating west of him used Pearl Street in traveling downtown, which would take them past McLean's station. McClung's credibility was seriously impaired by what proved to be an obvious alteration of his sales records, and accordingly his testimony is not credited unless it is corroborated by the testimony of other witnesses or by established facts. As previously found, the record establishes that there is a substantial flow of traffic from the north and north-

west which can easily choose between Pearl and Main Streets and readily pass either or both McClung's and McLean's stations. Independently of McClung's testimony, the record establishes that McClung was aware of the discrepancy in price occurring at McLean's station, that he and Crabtree called on McLean to ascertain what was occurring, and that McClung complained about the disparate treatment to respondent, which latter fact was admitted by respondent. As with the others, respondent did nothing for McClung.

In spite of the apparent alterations of McClung's sales record for the days in December after the price allowance to McLean, a careful analysis of these records reveals a substantial decline in gallonage during the first two weeks in January. McClung was in redit difficulties with respondent and as a result thereof respondent would not sell him gasoline except for cash. McClung went out of business in the latter part of January, and his operation and sales were not normal after January 14, 1956. An examination of Commission's Exhibit 22–E, McClung's sales records for December, 1955, reveals that the last three gallonage sales figures for December 29, 30, and 31 were altered by reducing the amount of gallonage approximately 276 gallons for the three days. A casual examination of the figures reveals erasures and changes as well as the fact that whoever did so made the mistake of forgetting to make the appropriate changes in the monthly total and in the dollar amounts listed in the column next to the gallonage figures. The first column for December 29 shows 275 gallons with an obvious erasure of the first digit, while the second column shows corresponding receipts of $79.45, with an obvious erasure of another figure appearing underneath. This amount of money is approximately correct for the gallonage listed, but it is apparent that

both figures have been altered. However, on December 30 the gallon figure is 276 with an apparent change in the first digit, whereas the amount received is $108.77, the amount which would have been received for 376 gallons, obviously indicating a change in the first digit from 3 to 2 or a total reduction of 100 gallons. The same thing occurred on December 31—: the first figure has obviously been changed from 402 to 302, whereas the dollar amount remains unchanged and is the correct amount for 402 gallons. In addition, a totaling of all the gallons sold in December appearing at the foot of the column exceeds by 276 gallons the actual figures appearing in the column, but is the correct total if the changed gallonages referred to above are restored to their apparent original amounts. In spite of the foregoing discrepancies, McClung's sales records do show a substantial drop in gallonage, on an average basis, for the first two weeks in January, 1956, compared with his monthly sales prior thereto. The record establishes and it is found that McClung's station was in the same competitive area as and in competition with McLean's station.

As found above with respect to Peery and McClung, and as will be found hereinafter with respect to Crabtree and Winning, the record establishes injury to them by respondent's discrimination. However, it must now be considered well settled that it is not necessary for the Commission to prove injury to competition in a secondary-line price discrimination case because of the meaning of the statutory language, "where the effect may be to substantially lessen competition," as construed by the Supreme Court, the Courts of Appeal and the Commission. In the recent *Sorensen* case,[2] the Commission quoted with approval

[2] *Sorenson Mfg. Co., Inc.*, — F.T.C. —, Docket 6052 (1956).

the holding of the Supreme Court in the *Morton Salt* case,[3] no doubt the leading case dealing with the meaning of the effect clause in a secondary-line price discrimination as follows:

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing *in itself* is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence. [Emphasis added.]

The dissent in *Morton Salt*, while preferring the language "reasonable probability" to "reasonable possibility," nevertheless agreed that the facts therein fully warranted an inference of adverse effect on competition without any actual showing of injury. Recent decisions of the Courts of Appeal are to the same effect.[4]

It seems self-evident that where a producer is selling a homogeneous product, such as salt, automotive parts or gasoline, where competition is extremely keen among retailers, and where margins of profit or mark-ups are small, a lower price to one or some of such competing retailers not only "may" but must have the effect of substantially lessening competition.

Crabtree operated a Sun station at 58th and Main Streets, east and north approximately two and one-

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[3] *FTC* v. *Morton Salt Co.*, 334 U.S. 3 (1948).

[4] *Moog Industries, Inc.* v. *FTC*, 238 F. 2d 43 (C.A. 8, 1956); *Edelman & Co.* v. *FTC*, 239 F. 2d 152 (C.A. 7, 1956), cert. den.

half miles from McLean's station. As previously found, the flow of traffic in either direction easily could alternate between Main and Pearl Streets and readily pass either or both such stations. Crabtree's gallonage fell off substantially in January after the price allowance to McLean on December 27. Crabtree sold approximately 17,000 to 18,000 gallons per month the last four months of 1955, but in January his gallonage dropped to 14,500. About January 1 Crabtree discovered that McLean was selling Sun gasoline for three cents per gallon less and visited McLean to find out why. While Crabtree was present at McLean's station, he helped McLean pump gas and waited upon, and talked to, several of his own former customers, who told him they were buying at McLean's station because of the lower price. It is difficult to conceive of more direct evidence of both competition and effect than this. Subsequently Crabtree and McClung together visited McLean and discussed the price situation with him and ascertained that he was receiving a price allowance from respondent. Crabtree, too, complained to respondent about the price discrimination but received no assistance until the general price reduction on February 16, 1956.

Winning operated a Sun station at 8028 Lem Turner Road, approximately three and one-half miles northwest of 19th and Pearl. Lem Turner Road is a main artery from the northwest section of Jacksonville feeding directly into Pearl Street a few blocks north of McLean's station, so that most of the traffic headed for downtown which passes Winning's station would also pass McLean's. Respondent's Exhibit 5 reveals that Lem Turner Road carries a high traffic flow, approximately one-half as large as that carried by Main Street. Winning was advised of the lower price for Sun gasoline at McLean's station by Win-

ning's own customers. Winning stated that a number of his customers, four of whom he identified by name and address, told him they could purchase the same gas for three cents less at McLean's and thereafter stopped buying from him for about one month. Winning's gallonage did not drop substantially in January. However, he testified that he worked much harder and tried to improve his service in an attempt to prevent any substantial loss of business. The indirect effect upon Winning is demonstrated by the fact that in February, after he received the price discount for the first time when the general price war broke out, his gallonage jumped from 410 gallons one day to 903 the next and stayed at such levels for several months.

As was pointed out by the witness Peery, the loss of customers to McLean also had an effect upon the sale of other items such as oil, tires, batteries, and accessories. While respondent contends that the price differential at McLean's station could have no effect upon its other dealers because they were not in the same competitive area, which respondent would limit to a very small area adjacent to and in the immediate vicinity of 19th and Pearl Streets, in addition to the facts found, hereinbefore, one of respondent's principal witnesses, its vice-president, Willard Wright, in testifying before a Senate Small Business Subcommittee in 1955 on behalf of respondent, had this to say:

> Keen competition always has existed in the marketing of gasoline in most parts of the country. Motorists are particularly price conscious when they buy gasoline. Americans of all income brackets own and operate automobiles. For those in the lower brackets gasoline is an important item in their family budgets and they seek opportunities to reduce the cost of that item.

> Moreover, unlike consumers of most commodities, motorists are mobile. They can without trouble drive several blocks down the street to another service station, if the first fails to please them. Indeed motorists will go out of their way a mile or two to save two or three cents on a gallon of gasoline. Out on the open highways, motorists sometimes drive past 10 to 20 stations before they stop at one whose appearance and posted prices suit them.
>
> Naturally the sellers of gasoline respond to these characteristics of their customers. Alert service station operators keep a sharp eye on the prices of their competitors and price changes, particularly on the downside, are quickly followed. Delay in doing so inevitably would mean a loss of business. Volume is important to the dealer because many of his operating costs are more or less fixed, irrespective of the number of gallons of gasoline he sells. Any substantial drop in volume means an increased unit cost of doing business.[5]

The fact that the effect of respondent's price discrimination "may be to substantially lessen competition" was fully elucidated in a recent Federal court decision, the *Enterprise* case,[6] where Judge Smith said, with respect to facts substantially similar to those herein: "The effects on gallonage of price differentials in the same brand and grade of gas within an area no larger than the Greater Hartford area must be found to be substantial."

In addition to its foregoing contentions, respondent also urges that its lower price was given to McLean in good faith to enable respondent to meet competition, as provided in Section 2(b) of the Clayton Act. For several reasons this contention is without

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[5] Commission's Exhibit 14–C.

[6] *Enterprise Industries, Inc.* v. *The Texas Company*, 136 F. Supp. 420 (U.S.D.C., Conn. 1955).

merit. First and most importantly, as found by the Court in the *Enterprise* case, *supra*, and as clearly evidenced by the decision of the Supreme Court in the *Standard Oil* case, the proviso in 2(b) has reference to the good faith meeting of competition of the *seller*, and not the competition of the buyer, as in this case. Exactly the same contention was made and disposed of in the *Enterprise* case, where the Court said:

> Moreover, Texas could justify discrimination only by a showing that it dropped its price to the other stations to meet an equally low price made available to those other stations by a competing oil company * * *. That is the competitive level at which the justification is provided for defendant in the Act, however. The Act does not go so far as to allow discriminatory price cutting to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the *seller's* competitors.

The decision of the Supreme Court in the *Standard Oil* case, *supra*, clearly establishes that the price which a seller may in good faith meet is that offered to a customer of the seller by the seller's competitor.

It is true, of course, as respondent argues, that where one or some of its dealers are faced with ruinous price competition respondent must take some action or suffer the loss of such dealership and respondent's sales thereto. Respondent would equate its dealers' competition with its own competition, but of course this is not the law and cannot justify price discriminations injuring others. Respondent could, if it chose to, meet such competition at the dealer level by nondiscriminatory reductions in price to all dealers, or by operating its own stations and thus being in direct competition with other stations which re-

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[7] *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

duce prices. Respondent's argument is essentially one of difficulties and problems claimed to have been brought about by the statute, which is not for the Commission to pass upon and more properly should be directed to Congress.

The second reason negating respondent's attempted reliance upon Section 2(b) is that the lower price at which respondent sold its gasoline to McLean was not made in good faith to enable McLean to *meet* his price competition. With regard to this, there is considerable evidence in the record concerning a contention by counsel supporting the complaint that the usual and customary price differential between so-called regular major gasoline and regular nonmajor gasoline is two cents a gallon. There is also considerable evidence in the record that the price differential between the two is frequently one cent a gallon. Suffice it to say that there is not sufficient reliable, probative and substantial evidence in the record to establish what, if any specific amount, is the usual and customary differential between major and nonmajor regular brands of gasoline. However, the record does establish that the usual differential between McLean's station and the Super Test station across the street was two cents a gallon. McLean unequivocably, testified that such a differential did not harm him competitively, but that when the differential was greater it caused him substantial injury. The record establishes that respondent gave McLean a 1.7-cent price allowance in order to enable him to post a price of 25.9, or one cent above the price to which Super Test had cut its gasoline. In the light of McLean's undisputed testimony, it is apparent that this was more than a good faith meeting of competition, even assuming *arguendo* such defense to be applicable, but was in effect a boating of competition which, of course, is not permitted by Section 2(b) of the Clayton Act.

The proviso is after all a proviso and can only justify price discriminations when made in good faith to *meet* competition; and as such obviously cannot justify price discriminations in excess of those necessary to meet competition.[8]

The third reason the 2(b) defense is not applicable here is that the lower price at which respondent sold its gasoline to McLean was not made in *good faith* to enable McLean to meet his price competition. As is found hereinafter in Section III–B, in connection with the granting by respondent of the discount to McLean, respondent and McLean entered into an agreement fixing the retail price at which McLean would resell the gasoline. Section 2(b) provides a defense to a seller if his lower price is made in "good faith" to meet an equally low price of a competitor. Numerous decisions have emphasized the fact that such a lower price must have been made in good faith and have even held in this regard that the price met must be a lawful one. It is apparent that a lower price granted as consideration for an illegal agreement to fix prices could under no circumstances be considered as one made in good faith.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and it is found, that respondent by engaging in the above-found acts and practices has discriminated in price between different purchasers of commodities of like grade and quality, and that the effect thereof has been, is, and may be substantially to lessen competition and to injure, destroy, and pre-

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[8] *Porto Rican Tobacco Co.* v. *American Tobacco Co.*, 30 F.2d 234 (C.A. 2, 1929); *Moss, Inc.* v. *FTC*, 148 F.2d 378 (C.A. 2, 1945); *Anheuser-Busch, Inc.*, —— F.T.C. ——, Docket No. 6331 (1957); Cf. *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951).

vent competition with other retailers of respondent's gasoline, in violation of Section 2(a) of the Clayton Act. It is further concluded and found that such price discrimination was not made in good faith to meet an equally low price of a competitor.

B. *The Price-Fixing Agreement*

As previously noted, Count II of the complaint alleged that respondent and McLean entered into a combination, understanding and agreement through which they fixed and maintained the retail price at which McLean sold his gasoline. It is undisputed in the record that McLean was an independent contractor with sole and exclusive authority to fix the retail price at which he sold his gasoline. The same incident on December 27, 1955, when respondent granted a discount to McLean, is also alleged as the price-fixing arrangement between respondent and McLean. As previously found, from August to December of 1955, McLean complained several times to respondent about the price cutting by the Super Test station across the street. Until December 27, each time McLean complained to respondent's agents, he was advised that there was nothing they could do about it. Respondent employs salesmen who, among other things, call upon the filling station operators in their territory. Prior to December 27, McLean had been contacted by salesman Elbey and Harper and also by Edward Beardsley, respondent's district manager.

The testimony of respondent's witnesses reveals that respondent had the situation at 19th and Pearl Streets under careful consideration for some time. McLean had made it clear that unless something was done to meet the Super Test competition he would be forced out of business. Beardsley advised Maximilian Dietshe, respondent's regional manager, of the

situation, and Dietshe in turn advised Willard Wright, respondent's vice-president at its home office in Philadelphia. After consideration of the situation and examination of the facts, they were all in agreement that something would have to be done to help McLean. McLean testified that on December 27 Harper contacted him and advised him that if Super Test dropped its price again respondent would try to do something. Later the same day after Super Test dropped its price, Harper returned and advised McLean that he would be given a price adjustment of 1.7 cents if he would absorb 1.3 cents himself and drop his retail price to 25.9. As previously found, McLean had been selling his gasoline at 28.9. His gross margin of profit or difference between wholesale and retail price had been 4.8 cents per gallon. As a result of dropping his price to 25.9 and absorbing 1.3 of this reduction, his gross margin of profit was reduced to 3.5 cents per gallon.

The key issue is, of course, just what arrangement or understanding was reached between respondent and McLean on December 27. Respondent contends, and its officials so testified, that there was no agreement with McLean concerning his retail price and that he voluntarily and unilaterally elected to post a price of 25.9 cents and take a cut in profit of 1.3 cents. McLean, too, testified that there was no "agreement" between him and respondent to fix his retail price, but his testimony concerning what was actually said and done on December 27 reveals quite clearly that there was an agreement entered into between respondent and McLean fixing the price at which he would sell his gasoline in consideration of being granted a price allowance or discount by respondent.

McLean testified that he was required to take a 1.3-cent cut in profits in order to get the adjustment. Again, after testifying that there was no "agreement"

to fix his retail price at 25.9 cents per gallon, McLean testified as follows:

> Q. So that was a reduction of three cents a gallon?
>
> A. Yes, sir.
>
> Q. Did Mr. Harper or any representative of the Sun Oil Company say to you that they would attempt to keep this differential of three cents?
>
> A. No, sir, not that I remember.
>
> Q. But on that particular time, did he say that to you?
>
> A. It was *made* that I wanted and *they stated* that I drop my gas to that price according to Super Test across the street, but as far as dropping it any lower or raising it—[Emphasis added.]

It is clear from the testimony of McLean that he was required by respondent to take a cut in profits of 1.3 cents per gallon, i.e., to post a price of 25.9 cents per gallon, in order to secure the price discount of 1.7 cents per gallon from respondent. Harper, respondent's agent who made this arrangement with McLean, was not called as a witness, and accordingly McLean's testimony stands undisputed.

In addition to McLean's direct testimony concerning the arrangement, the factual circumstances surrounding it also lead inevitably to the conclusion that McLean did not voluntarily and unilaterally post the price of 25.9 cents, but did so as the result of an agreement with respondent in order to obtain the price assistance. It has previously been found, as McLean himself testified, that he was not hurt competitively as long as the price difference between his station and the Super-Test station did not exceed two cents a gallon. In addition to his testimony to that effect, undisputed stat 'ical facts in the record clearly reveal that McLean was not hurt competitively

when the difference between his price and Super Test's was two cents per gallon. This is dramatically illustrated by what happened after December 27.

When McLean cut his price to 25.9 cents on December 27, Super Test was selling its gasoline at 24.9. On January 3, 1956, approximately one week later, Super Test dropped its price to 23.9, and thereafter for substantially the entire month of January a two-cent differential existed between McLean's and Super Test's prices. Nevertheless, although the record reveals that Super Test's gallonage at 19th and Pearl had been averaging between 10,000 and 11,000 gallons per month up to December and was approximately 19,000 gallons in December, during which month Super Test cut its price several times, in January, 1956, Super Test's gallonage jumped to 61,000-plus gallons and McLean's gallonage jumped approximately four or five times in excess of the preceding months. These facts make it abundantly clear that it was not necessary for McLean to reduce his price to within one cent of Super Test in order to be competitive, inasmuch as after a price reduction his gallonage increased tremendously during a month when for all but two days the difference in price between McLean and Super Test was two cents per gallon. If McLean had not been required to reduce his price to 25.9 in order to receive the 1.7-cent allowance from respondent, he could have reduced his price to 26.9, within two cents of Super Test's price, not have been hurt competitively, and yet retained a margin of four and one-half cents per gallon, thereby reducing his gross profit only .3 cents per gallon. If he had done this, it is clear from the record that his competitive situation would not have been injured and he would have maintained a much more adequate margin of profit.

McLean told Crabtree and McClung when they contacted him concerning his lower prices that he was very dissatisfied with the arrangement because while he was selling a lot of gasoline he was doing a lot of work and not making much profit. This is corroborated by the fact that although McLean substantially increased his gallonage in January and February, on or about February 18 he gave up and went out of business. It is apparent that if McLean had retained unilateral control of his retail price, he could have reduced his price to within two cents of Super Test, retained substantially all of his margin of profit, and substantially increased his gallonage because that is exactly what happened during January with a reduced price and a two-cent differential between the stations.

It is well settled, and requires no extended discussion, that price fixing, no matter in what manner, shape, or form, and regardless of the motivation, is illegal *per se*.[9] The following comments of the Supreme Court in the *Socony-Vacuum* case[10] seem appropriate here:

> * * * But the thrust of the rule is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering

[9] *Ethel Gas Corporation* v. *U.S.*, 309 U.S. 436 (1940); *U.S.* v. *Socony-Vacuum Oil Company*, 310 U.S. 150 (1940); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384 (1951); and *Virginia Excelsior Mills, Inc.*, — F.T.C. —, Docket No. 6630, October 25, 1957.

[10] Footnote 9, *supra*.

with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

* * * * *

Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. * * * Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon. And the fact that, as here, they are fixed at the fair going market price is immaterial.

While it has been found above that there is direct evidence of the price-fixing agreement, it is settled law that such an agreement also may be proven by circumstantial evidence,[11] as also found above. It further has been held by the Supreme Court that business behavior is admissible circumstantial evidence from which the fact-finder may infer agreement.[12]

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[11] *United States Maltsters Assn.* v. *FTC*, 152 F. 2d 162 (C.A. 7, 1945); *Milk & Ice Cream Can Institute* v. *FTC*, 152 F. 2d 478 (C.A. 7, 1946); *Fort Howard Paper Co.* v. *FTC*, 156 F. 2d 899 (C.A. 7, 1946); *Allied Paper Mills* v. *FTC*, 168 F. 2d 600 (C.A. 7, 1948); *Triangle Conduit & Cable Co.* v. *FTC*, 168 F. 2d 175 (C.A. 7, 1948) aff'd, 336 U.S. 956; and *National Lead Co.* v. *FTC*, 227 F. 2d 825 (C.A. 7, 1955).

[12] *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); and *Theatre Enterprises, Inc.* v. *Paramount*, 346 U.S. 537 (1954).

In addition to denying that it had engaged in price fixing, respondent contends that even if it had it was not in violation of the Act because of the amendment of Section 5 by the McGuire Act authorizing pursuant to State laws fair trade agreements prescribing minimum or stipulated prices for the resale of branded products. The short answer to this contention is that the Florida Fair Trade Act was held unconstitutional as to nonsigners by the Supreme Court of Florida.[13] This decision, as well as numerous others, makes it clear that the McGuire Act amendment refers only to written agreements or contracts for fair trade prices, and, of course, there was no written agreement here. In addition, the Supreme Court in the *McKesson-Robbins* case[14] held that a corporation which both manufacturers and wholesales a product cannot, under the Miller-Tydings or the McGuire Acts, enter into fair trade agreements with wholesalers because in effect such agreements would be between competitors and hence in violation of Section 5(a)(5) of the Act. Respondent itself operates certain filling stations known as company stations, and accordingly if there were any fair trade agreement, it would be in violation of Section 5(a)(5) of the Act and no defense to a price-fixing agreement.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent and McLean entered into, maintained and carried out a planned common course of action, agreement, combination, or understanding to fix and maintain the retail price at which McLean was to sell gasoline, all to the prejudice and injury of the public.

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[13] *Miles Laboratories, Inc.* v. *Eckerd*, 73 So. 2d 680 (Fla. Sup. Ct. 1954).

[14] *U.S.* v. *McKesson & Robbins, Inc.*, 351 U.S. 305 (1955).

respondent's competitors, and McLean's competitors, which constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Act.

Conclusions of Law

1. Respondent is engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and the Clayton Act.

2. The effect of the acts and practices of respondent hereinabove found in Section III–A may be and has been to substantially lessen competition, and to injure, destroy, and prevent competition with the recipient of respondent's discrimination, such acts and practices constituting a violation of Section 2(a) of the Clayton Act.

3. The acts and practices of respondent hereinabove found in Section III–B are all to the prejudice and injury of the public and competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

4. As a result thereof, substantial injury has been done to competition in commerce.

5. This proceeding is in the public interest, and an order to cease and desist the above-found acts and practices should issue against respondent.

Order

It is ordered, That respondent Sun Oil Company, a corporation, its officers, directors, agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its products in com-

merce, as "commerce" is defined in the Act and the Clayton Act, do forthwith cease and desist from:

A. Discriminating in price by selling such products of like grade and quality to any purchaser at net prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of respondent's products;

B. Entering into, continuing, cooperating in, or carrying out, or attempting so to do, any planned common course of action, understanding, agreement, combination, or conspiracy with any person or persons not parties hereto, to attempt to, or to establish, fix, adopt, maintain, or adhere to, by any means or method, prices at which said product is to be resold;

C. Granting any discounts, rebates, price reductions or other form of consideration for the purpose, or with the effect, of fixing or maintaining the prices at which said product is to be resold.

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Act as amended by the McGuire Act (Public Law 542, chapter 745, 82nd Cong., 2d Session, approved July 14, 1952).

ROBERT L. PIPER,
Hearing Examiner.

APRIL 29, 1958.

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted]

FEDERAL TRADE COMMISSION, *Petitioner*

v.

SUN OIL COMPANY, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 629

FEDERAL TRADE COMMISSION, *Petitioner*

v.

SUN OIL COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

The petition for certiorari (p. 9) states the question presented by describing the decision of the Court of Appeals as holding that the Robinson-Patman Act's meeting competition defense is available to a seller when the seller seeks to enable its buyer to meet the lower price of a competitor of the buyer. This description to some extent begs the question for it assumes the correctness of the petitioner's definition

of "competitor." Put in wholly factual terms, the question presented is whether the Court of Appeals properly held that Sun Oil Company, a "major" marketer of a branded gasoline, when confronted by local price cutting competition on the part of a supplier-retailer of another branded gasoline which causes consumers to turn away from Sun's branded product and reduces the volume of a dealer distributing Sun's product to consumers, was justified in lowering its price to that dealer to meet *that* competition.

The Court of Appeals found that the competition involved in these marketing activities included competition between Sun and the competing supplier-retailer, Super Test, and no challenge is made as to the factual basis for this finding.[1]

ARGUMENT

The unfelicitous language of Section 2 of the Robinson-Patman Act, particularly the meeting competition proviso, required interpretation in its application to the facts of this case. *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231; *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U.S. 746. The need to interpret the statute in the context of the problem posed by this case is as plain as it was in *Standard*. The price competition by Super Test essen-

[1] That Super Test was a supplier-retailer as found by the Court of Appeals, is supported by evidence throughout the record before that Court. See, for examples, pages 338 and 494-6 of the Transcript of Record. The Commission appears to have come to a similar conclusion, for it accepted as valid (petition for certiorari, page 7) Sun's contention that it was competing, together with McLean, as one channel of competition, "with other channels of competition", including Super Test, as appears from the context.

tially took away *Sun's* business when Super Test took to itself, whatever the method, McLean's gasoline sales of Sun's product.

The Court of Appeals, in its necessary effort to decide the probable intent of Congress and to reconcile the provisions of the Robinson-Patman Act with the "broader antitrust policies that have been laid down by Congress," *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 74, reached a correct result by following the lines of interpretation and the choice of basic antitrust values endorsed in decisions of this Court interpreting this statute. *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231; *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U.S. 746. Thus the Court of Appeals (p. 31a, petition for certiorari) placed emphasis on an individual competitive situation; gave primacy to the health of the competitive process, as against injury to particular competitors; adopted an interpretation which protects the small retailer by preventing widespread, disastrous price wars; and eschewed an interpretation which would foster vertical integration of major refiners and eliminate small independent businesses.

All of this the Court of Appeals' interpretation achieves in addition to the two aims, stated elsewhere in its decision and to which the petition for certiorari confines its attention, viz: promoting competition at the retail level, and providing an opportunity for a major to break away from a uniform pricing system.

The petition for certiorari argues (p. 15) that the interpretation of the Court of Appeals will coerce independents to avoid price competition with the majors.

and that this will further rigidify the price structure of the majors. Nothing in the Court of Appeals decision prevents an independent from initiating price competition. If there should follow what the petition (p. 15) calls "selective price warfare" on the part of a "major", this would be predatory pricing which cannot qualify as good faith meeting of competition and is clearly controlable by the Commission or the Federal Courts. The petitioner's fears as to price rigidity are, however, supportable by the Commission's interpretation, for it requires a major to maintain a rigid price structure throughout its marketing area in the face of local price cuts by an independent, a rigid structure either at the pre-existing major price or at a new lower level. Thus a vaster rigidity, usually followed by a chain reaction of price reductions by other marketers, carrying price war injury to or elimination of independent dealers, is the likely consequence of the Commission's interpretation. *Cf.* Mr. Justice Douglas dissenting in *Standard Oil Company* v. *United States*, 337 U.S. 293, 315.

The assertion in the petition for certiorari (p. 9) that this case presents an important question concerning the meaning of the meeting competition defense, is not supported in the record. The Court of Appeals was at pains to point out that the gasoline dealer is a "rare bird"; that gasoline is marketed in a unique facility, the dealer operated service station; that the dealer, in the words of Mr. Justice Jackson in a dissenting opinion in *Standard Oil Company* v. *United States*, 337 U.S. 293, 323, is a conduit from the oil fields to the driver's tank. The petition argues (p. 14) that in a sense all retail distributors are conduits. But the marketing of gasoline is quite singular in that, unlike

other consumer needs, gasoline is required in the course of mobility over wide areas; it is flammable; it cannot be stored by the consumer; it cannot be stored for long term supply by the dealers; and an assured supply, accompanied by wide consumer acceptance and the availability of related petroleum products, must be maintained by the supplier. The applicability of this decision to the marketing of the generality of consumer goods is not apparent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 56

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 351–384) is reported at 294 F. 2d 465. The initial decision and proposed order of the hearing examiner (R. 12–33) are reported at 55 F.T.C. 955; the opinion of the Federal Trade Commission (R. 34–43) is reported at 55 F.T.C. 973, and the Commission's order (R. 34) at 55 F.T.C. 981.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1961 (R. 385). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Black on October 20, 1961, to and including December 22, 1961 (R. 386). The petition was filed

on December 22, 1961, and was granted on February 19, 1962 (R. 387; 368 U.S. 984). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a marketer of gasoline, charged with price discrimination in violation of Section 2(a) of the Clayton Act, establish the defense that "the lower price * * * was made in good faith to meet an equally low price of a competitor" under Section 2(b), by showing that it gave the discriminatory lower price to one of its retailer customers in order to aid the favored retailer in competing with a service station retailing a different brand of gasoline.

STATUTE INVOLVED

Section 2 (a) and (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13 (a) and (b), provides in part as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create

a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

The Federal Trade Commission on January 5, 1959, entered a cease-and-desist order against respondent Sun Oil Company ("Sun") on the basis of the Commission's determination that Sun had violated Section 2(a) of the Clayton Act in the sale of gasoline, by granting price concessions to one of its retailer

customers in Jacksonville, Florida, that it did not give to other retailer customers engaged in competition with the favored customer in the same marketing area. Since Sun offered no evidence that the favored retailer had been offered gasoline by any other supplier, the Commission held that the price discrimination was not made by Sun in good faith "to meet an equally low price of a competitor" and was not justified under Section 2(b). (R. 38). The court of appeals reversed, holding that Sun had established the defense under Section 2(b).

The Commission's findings relating to the violation of Section 2(a) of the Clayton Act were not questioned by the court of appeals and the relevant facts on the issues presented to this Court are not in dispute.[1]

Respondent's Business.—Sun, a New Jersey corporation, is a major integrated producer-distributor of petroleum products, including gasoline (R. 15, 352). It is engaged in the refining, transportation, distribution and sale of gasoline and other petroleum products throughout the United States (R. 2–3, 352).

[1] The complaint filed by the Federal Trade Commission contained two counts. The first count related to the charge of price discrimination under Section 2 of the Clayton Act; the second count charged Sun with violating Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, by entering into an agreement with the favored dealer to fix the resale price at which he sold gasoline. The hearing examiner and the Commission found that Sun had violated both statutes. The court of appeals set aside as not supported by substantial evidence the findings under the second count. Review of this ruling was not requested in the petition for a writ of certiorari.

It distributes automotive gasoline under the well-known brand name "Sunoco" in 18 states (R. 85).[2] Sun has adopted a distribution system under which it does not ordinarily distribute gasoline and other service station products directly to motorists at retail but sells to service station operators who lease their stations and facilities and purchase their gasoline for resale from Sun (R. 14, 15). Sun admitted that its lessee operators were independent contractors and both the Commission and the court below so found (R. 26, 35, 266, 352).[3]

Under this system of distribution, the expenses of operating the retail service stations and the risks of profit or loss in the retail operation rest with the serv-

[2] In 1954 Sun ranked 38th in the order of sales among the largest industrial corporations of the United States, 44th in assets and 36th in net profits. S. Rep. No. 2810, 84th Cong., 2d sess., p. 7. It ranked 13th among the largest integrated oil companies. H. Rep No. 1423, 84th Cong., 1st sess., p. 23.

[3] The development of Sun's marketing system is reviewed in *United States* v. *Sun Oil Company*, 176 F. Supp. 715 (E.D. Pa.). In that case the court, in a 1959 opinion, found that Sun over a period of years had violated Section 3 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 14, by a program and course of conduct, implemented by written contracts, leases, and other direct and indirect activities, requiring its dealers to purchase gasoline and lubricants and automobile accessories exclusively from it and to refrain from purchasing such products from any of Sun's competitors. The program included short-term cancellable leases of Sun-owned or subleased stations and station storage facilities, the required use of Sun colors and trademarks as well as disciplining dealers by indirect methods such as tardy deliveries of gasoline, delays in repairs, and withholding equipment (176 F. Supp. at 727, 728, 737). The court also found that Sun had 6,984 dealers in 1956 (176 F. Supp. at 739).

ice station operator rather than with Sun, and the Sun service station operators do not have the benefits or protections of legislation covering the employment relationship. The consequences of direct operation by Sun of the retail service stations which it leases to the service station operators would, as observed by the court below, involve matters such as the application of chain store taxes, social security, wage and hours and collective bargaining legislation (R. 355, n. 6). Direct operation would also involve tort and workmen's compensation liability, income tax withholding and other matters.[4]

Sun subdivides its sales and distribution operations into regions, districts, and sales territories (R. 86, 87). At the time of the events in question in this case, Sun was supplying approximately 300 service stations in the region that included Florida. Only four of these 300 stations were operated directly by Sun, and one of the four was a training center (R. 88). Thirty-eight service station operators were selling Sun products in the Jacksonville, Florida, area (R. 15), which included three Sun sales territories (R. 16). Eight of these were in the territory which comprised the northern one-third of Duval County, in which Jacksonville is located (R. 16).

[4] In *United States* v. *Sun Oil Company*, *supra*, note 3, the court found that the enactment of chain store tax and social security legislation motivated Sun to shift from direct service station operation to its lessee-dealer program (176 F. Supp. 715, 731, 732). In the shift from direct operation to lessee-dealer operation, Sun converted employees into lessee-dealers. However, Sun sought to have actual operations continued as they had been prior to the shift (176 F. Supp. 715, 731).

Gilbert V. McLean was one of the eight Sun service station operators in this sales territory. He leased from Sun a service station located at the corner of 19th and Pearl Streets in Jacksonville (R. 15) and started operating the station on February 22 1955 (R. 57). Six of the other Sun dealers were fairly close to McLean's station (R. 16, 352, n. 1). As of June 1955, McLean and the other retailers of Sun gasoline in the sales territory were purchasing Sun's regular gasoline at 24.1¢ per gallon and retailing it at 28.9¢ (R. 15, 16, 26–27); their margin for overhead and profit was thus 4.8¢ per gallon.

The Discriminatory Price Allowance.—In June 1955 (less than four months after McLean started business), the Super Test Oil Company opened a service station diagonally across the street from McLean (R. 15). The record does not indicate the extent, if any, to which Super Test operated other than as a retailer or from what source it secured its gasoline, although there are indications that Super Test operated approximately 65 service stations (R. 319).[5] During most of the period between June and December 1955 Super Test sold its regular gasoline at 26.9¢ per gallon, 2¢ less than the price at which McLean was selling Sun's regular gasoline (R. 15). Since Super

[5] At this time Sun was supplying only one grade of gasoline and its dealers did not handle any other grade (R. 382).

[6] Except for the station located across the street from McLean's station, the record does not show the locations of the Super Test stations nor the prices they posted. It does show that Super Test gasoline was lower in octane rating than Sun's gasoline (R. 263) and that the Super Test station lacked facilities that McLean's station possessed (R. 262).

Test sold a so-called "non major" or "independent" brand of gasoline, as compared with a "major" name brand of which Sunoco was one (R. 15), this price differential did not adversely affect McLean's competitive position (R. 61, 76–77).[7] On a number of occasions, however, generally on weekends, the Super Test station across from McLean substantially reduced the price of its gasoline to as low as 21.9¢ per gallon (R. 15). On each of these occasions, McLean's sales at 28.9¢ a gallon (purchased from Sun at 24.1¢ a gallon) declined substantially (R. 15).

McLean complained to Sun about the inroads on his business resulting from Super Test's lower retail prices and sought relief in the form of a reduction in the price he was paying Sun (R. 15–16, 61, 62). At first Sun did nothing (R. 62, 166), but in late December 1955 it advised McLean that, if Super Test reduced its price again, Sun would come to his assistance (R. 26, 63). On December 27, 1955, Super Test reduced its price from 26.9¢ to 24.9¢ for regular gasoline. The same day, pursuant to the previous understanding, Sun gave McLean a price allowance or discount of 1.7¢ per gallon (R. 16). Sun required McLean to execute a Sun form letter requesting the reduction to meet a "depressed retail gasoline price situation" and stating the retail price which McLean would post (R. 273, 342). No price reduction was

[7] Two cents per gallon was the "normal" price differential between "major" brands and "non major" brands in the Jacksonville area at that time (R. 169). However, in what it termed a "sub-normal" price situation involving an independent brand, it was Sun's "normal" practice to have a posted retail price within one cent of the independent (R. 182–183).

given to any of the other Sun dealers in the marketing area (R. 16). McLean immediately (on December 27, 1955) cut the price of his regular gasoline by 3¢ from 28.9¢ to 25.9¢ (R. 16). This reduced McLean's margin from 4.8¢ to 3.5¢ so that he absorbed 1.3¢ of the retail price reduction (R. 16, 170, 171). It also cut the spread between his retail price and that of Super Test to 1¢.[8]

Super Test within the next day or two reduced its price for regular gasoline to 23.9¢ (R. 78, 81) thereby restoring the 2¢ differential (R. 169). No further price cuts occurred until a general price war, involving price cuts by other major suppliers, broke out in mid-February (R. 16, 90–91), whereupon, on February 16, 1956, Super Test cut its price to 22.9¢ (R. 329).

The Effects of the Discriminatory Price Allowance.—McLean's price reduction on December 27, 1955, concurrent with Sun's discriminatory price allowance to him, had immediate adverse effects on the other retailers of Sun's products in the McLean sales territory. Sun stations located at distances varying from less than a mile to approximately three and one-half miles from McLean's station (R. 36–37), and having locations on a common traffic and trade

[8] Willard Wright, a Sun Vice President, testified that a dealer who wanted to meet a competitive retail price, would under the company's policy be "allowed" a margin of 3.5¢ (R. 275, 278). Wright also testified that the supplier and not the dealer assumed "the major responsibility for promoting and guiding competition within the area" (R. 213), and that the company allowed dealers "what we consider the margin that he needs to continue in business" (R. 273).

pattern (R. 17, 18, 19, 20–22), lost business as a result of the price allowance granted McLean. Four of these dealers, Peery, McClung, Crabtree and Winning, testified at the hearing (*ibid.*). The Commission found that the four testifying dealers were competitively injured by the discriminatory price allowance to McLean (R. 36–37, 357). Dealers testified that they saw some of their former regular customers purchasing from McLean, and two stated that customers had told them they had switched to McLean because of McLean's lower price (R. 21, 47, 150, 188–190). At least three of them complained to Sun concerning the adverse effects of McLean's lower price, and they asked Sun to give them equal price allowances (R. 18–19, 21, 117). Sun, however, refused. In mid-February 1956, after a general "price war" had broken out in the Jacksonville area, and other major gasoline suppliers had already lowered their prices to their retail dealers (R. 90–91), Sun reduced the price at which it sold its gasoline to all its remaining dealers in the area (R. 16).

As a result of the price allowance given to him by Sun and the lower price at which he sold at retail, McLean's sales very substantially increased (R. 16, 28, 36). While his sales had averaged approximately 6,700 gallons per month during the previous six-month period, they amounted to 8,368 gallons in December 1955 (in which the lower price was in effect for the last five days) and 32,115 gallons in January 1956 (R. 354). During the same period the gasoline sales of the three complaining Sun dealers substantially declined (R. 36–37) and the fourth dealer testi-

fied to the loss of specific customers to McLean (R. 37).[9] On February 18, 1956, despite the increase in sales, McLean, who had cut his profit margin by 1.3¢ per gallon, went out of business (R. 39). Among the other Sun dealers in the sales territory who testified, McClung gave up his station in January 1956 because he did not have sufficient funds to pay cash for a Sun minimum gas delivery (R. 118); Peery ceased operating his station in September 1956 because it became "more * * * than I could handle" and because Sun failed to live up to promises to provide him with additional facilities (R. 51–52, 55–56); Crabtree also gave up his station in September 1956, although the record does not reflect his reasons (R. 143). Thus, only one of the five dealers who testified—Winning—remained a Sun dealer in the Jacksonville area at the time of the hearings (R. 187).

The Administrative Proceedings.—On September 26, 1956, the Federal Trade Commission filed a complaint charging Sun with violations of both Section 2(a) of the Clayton Act and Section 5 of the Federal Trade Commission Act (R. 2). After full hearings, the examiner issued an initial decision (R. 12), concluding that Sun had violated both statutes as charged, and proposing a cease-and-desist order (R. 32). The examiner rejected Sun's defense that its granting of the preferential discount to McLean had been a good faith effort to meet an equally low price of a competitor, on the ground that "the proviso in 2(b) has reference to the good faith meeting of

[9] There was also a loss of custom by the other Sun dealers for oil, lubrications, and other products and services (R. 59).

competition of the seller, and not the competition of the buyer, as in this case" (R. 23).

On appeal, the Commission affirmed, adopting the examiner's findings and proposed order (R. 34). The Commission found that there had been actual competitive injury to the nonfavored Sun dealers in the marketing area (R. 36–37). It found that, in addition, an inference of competitive injury could be drawn from a situation where (as here) one of several retailers, "selling an identical product at the same price and under substantially the same conditions" and "operating at a small margin of profit and in an area which was a reservoir of potential customers" who had easy access to all of them, "received a discount from a common supplier" (R. 37–38). With respect to the Section 2(b) defense, the Commission found that Sun's discriminatory discount was "not made to meet a lower price made to the latter by another supplier" but "to meet the competition of the Super-Test station across the street" (R. 38). It concluded that the theory that would justify such a purpose—*i.e.*, that Sun and its dealer were actually "competing as a unit with other channels of competition"—"goes beyond the plain wording of the proviso which has reference to the good faith meeting of competition of the seller, rather than that of the buyer" (R. 38).

The Decision Below.—The Court of Appeals for the Fifth Circuit reversed.[10] It reasoned that the gasoline sold by Sun was ultimately in competition with the

[10] The reversal of the Commission's finding of a violation of Section 5 is not presented for review (see note 1, p. 4, *supra*).

gasoline sold by Super Test; that Sun carried on this competition through its "conduit," McLean; that Sun believed McLean might be forced out of business, thereby thwarting Sun's efforts to compete with Super Test; and that therefore Sun was "entitled to assert the defense of meeting competition in good faith" (R. 379–380). The court rejected the Commission's view as "unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act" (R. 360). It did not question the findings by the Commission under Section 2(a) relating to the competitive injury to the other Sun retailers in the marketing area, and the court "recognized that some dealers may suffer a diversion of business when the supplier lowers its price to meet competition" (R. 366).[11] The court, however, concluded that "[t]aking a coldly objective view of this case, one would have to say that, regardless of some injury to certain Sun dealers, Super Test's price cutting and Sun's response of making an allowance to McLean benefited consumers and the competitive process in at least two ways: by promoting competition at the retail level and by providing an opportunity for a major to break away from a uniform pricing system characteristic of

[11] The court did comment "it would seem impossible to say whether they [the non-favored dealers] suffered a substantial loss of gallonage from Sun's price allowance to McLean or from Super Test's aggressive price cutting" (R. 366). It did not, however, overrule the Commission's findings as to both actual and probable competitive injury to the non-favored dealers (R. 37–38).

an oligopolistic industry such as the oil industry" (R. 367, footnotes omitted).

SUMMARY OF ARGUMENT

Under the proviso of Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, a seller may offer as a defense to a charge of price discrimination in violation of Section 2(a) that the discrimination "was made in good faith to meet an equally low price of a competitor." The Commission held that, where Sun, a major oil company, had granted one of its retail dealers a discriminatory low price in order to enable that dealer to meet the retail price being offered by an independent competitor, thereby causing competitive damage to other nearby Sun dealers who did not receive the lower price, the Section 2(b) defense is not available to Sun. It concluded that the defense can be interposed only by a seller who seeks to meet a price that his competitor has actually offered his buyer and that it is not available to one who discriminates in order to meet his buyer's competition.

I

In so holding, the Commission was giving effect to the plain meaning of the statute. The normal and customary meaning of the word "competition" as used in the Section 2(b) proviso refers to competition at one level—*i.e.*, the seller's level—not competition at any economic level; when Congress has wished to legislate in terms of the latter concept, it has done so explicitly. Moreover, to construe the proviso as permitting the seller to grant his buyer a price designed to meet a

price offered by his buyer's competitor would not only rob the phrase "equally low price" of any real meaning, but would deprive the Commission of any objective standard for determining whether a discriminatory price had been given lawfully to meet a competitor's price or unlawfully to undercut that price.

The Commission's construction of the Section 2(b) proviso is consistent with its legislative history. The dominant purposes of Congress in bringing the proviso to its present form through the Robinson-Patman Act were (1) to strengthen the antitrust laws by "contraction" of the Section 2(b) defense; (2) to provide greater protection against supplier discrimination to smaller distributors; and (3) to shift the focus of the defense from a broad appraisal of the effect of discrimination on competition generally to a more narrow concern with its effect on actual victims. In confining the proviso to a seller's competition for the business of his purchasers, and in thus refusing to sanction a supplier's aiding one retailer in his quest for customers at the expense of other retailers, the Commission was not only giving the proviso the narrow construction intended by Congress, but it was honoring the legislative purposes of protecting small distributors against supplier discrimination, and of focusing upon actual injury resulting from the discrimination.

The only reported court decision on the question at issue (other than that of the court below) is *Enterprise Industries, Inc.* v. *Texas Co.*, 136 F. Supp. 420 (D. Conn.), in which a district court adopted the construction of the Section 2(b) proviso reached by the

its Bureau of Investigation over the signature of Harry A. Babcock, Director of the Bureau.[3] One such letter (App., *infra*, pp. 55-57) was sent on June 8, 1954 to James V. Cresente, President of the Cleveland Independent Gasoline Dealers Association, Inc., to explain why no action would be taken on seven complaints lodged against various oil companies,[4] and two such letters (App., *infra*, pp. 58-62) were sent on August 18 and November 22, 1954, to William D. Snow, General Counsel of the National Congress of Petr[illegible]n Retailers, Inc., concerning a complaint against [illegible]o on behalf of the Mississippi Service Station Operators Association of Jackson, Mississippi.[5]

The Babcock letters represented an application of what was then consistent Commission policy to refuse to proceed

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[3] The fact that the official administrative construction was made public in letters does not mean that it should carry less weight than a construction evidenced by a complaint, a decision in a litigated case before the Commission or in an administrative rule or regulation published in the Federal Register. Thus, in *United States* v. *Zucca*, 351 U. S. 91, 96 (1956), the Court referred to a single, unpublished, informal inter-departmental letter as furnishing proof of the administrative construction of the Act involved. Recently, in *Hanover Bank* v. *Commissioner*, 369 U. S. 672, 686 (1962), the Court relied on unpublished letters to taxpayers, who were not even involved in the pending litigation, as revealing "the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws." Similarly, in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 246-247 & nn. 12-13 (1951), the Court resorted to statements of members and counsel of the Federal Trade Commission, of representatives of the Department of Justice, and of similar spokesmen in order to ascertain the "understanding" of the scope of the Section 2(b) defense.

[4] The Cresente-Babcock correspondence is reprinted in Hearings on Distribution Problems before Subcommittee No. 5 of the House Select Committee on Small Business, 84th Cong., 1st Sess. 852-853 (1955). The seven complaints are reprinted in *id.* at 846 851.

[5] The Snow-Babcock correspondence is reprinted in *id.* at 459-463; Hearings on Price Discrimination: The Robinson-Patman Act and Related Matters before the House Select Committee on Small Business, 84th Cong., 1st Sess. 448, 913-916 (1955); Hearings on Amending Section 2 of the Clayton Act before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 84th Cong., 2d Sess. 89-92 (1956).

against an oil company for reducing its price to one of its dealers to enable him to meet a lower price of a competitor. During the early 1950's, the Commission had undertaken investigations in Pennsylvania, New Jersey, and in a number of Midwestern and Southern states, where oil companies had granted temporary price allowances to particular dealers. These investigations established that the pricing practices under inquiry had resulted from efforts by the oil companies to meet competition at the retail level during local gasoline price wars. But the investigations failed to provide any basis for a proceeding under the Robinson-Patman Act because, as the Commission interpreted the Act in its letters, Section 2(b) permitted an oil company to lower its price to a dealer to meet, and enable the dealer to meet, the competition of rival dealers selling gasoline at a reduced price during local price wars. The Commission flatly stated (App., *infra*, 56, 59-60):

> "[A] seller is within his legal rights in confining his price reductions to dealers in the vicinity of the dealer or dealers whose competition he seeks to meet, even though such action results in injury to customers to whom similar reductions are not made available."

The Commission therefore closed the investigations.[6]

B. The Original Construction Was in Fact Represented and Accepted as Official Commission Policy.

It goes without saying that the original construction of Section 2(b) is a source of considerable embarrassment

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[6] No less weight is accorded administrative policy which leads to negative action, such as closing investigations without filing a complaint, than that which leads to positive action, such as bringing suit. "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, 352 (1941).

to the Commission in its efforts to brand unlawful what it once approved. In the *Texaco* case, now pending before a hearing examiner of the Commission, counsel for the Commission even went as far as to claim that the construction reflected by the Babcock letters "was not an official statement of the Federal Trade Commission," but merely an utterance "by a Director of the Bureau of Investigation." Tr. 5650, *The Texas Co.*, FTC Dkt. No. 6898.

This recent attempt to belittle the administrative construction of Section 2(b) is a far cry from the original understanding of the significance of the Babcock letters. In the first place, the letters themselves show that they embodied official Commission policy. Not only were they written on the Commission's letterhead, but throughout the letters there is constant reference to actions taken or not taken and decisions made by *the Commission*.[7]

Moreover, the Babcock letters were repeatedly referred to[8] and reproduced[9] in Senate and House hearings and reports on the premise that the letters reflected Commis-

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[7] For example, the following statements appear in the letters: "In no instance has *the Commission* issued a complaint where it has been shown that a major oil company reduced its price to a filling-station operator . . ." (App. *infra*, p. 61); "no corrective action has been taken by *the Commission* because of the defense available to the sellers under section 2(b) . . ." (App., *infra*, pp. 55-56, 59); "it would appear inadvisable for *the Commission* to initiate an additional investigation . . ." (App., *infra*, p. 62); "it is not believed that *the Commission* would be warranted in conducting further action with respect to this matter at the present time" (App., *infra*, p. 57) (emphasis added).

[8] See, *e.g.*, Hearings on Distribution Problems, *supra* at 148-160, 456-459; Hearings on Price Discrimination, *supra* at 906-907; Hearings on the Gasoline Price War in New Jersey before a Subcommittee of the Senate Select Committee on Small Business, 84th Cong., 1st and 2d Sess. 450 (1956).

[9] See fn. 4 & 5, *supra*, p. 10.

sion policy. Congressional committees,[10] representatives of the various dealer associations who had received the Babcock letters,[11] and Texaco[12] treated the view expounded in the Babcock letters as the Commission's then official position on the scope of the Section 2(b) defense; and so did the Chairman and other spokesmen of the Commission at the Hearings on the Gasoline Price War in New Jersey before a Subcommittee of the Senate Select Committee on Small Business, 84th Cong., 1st and 2d Sess. (1956). Chairman Gwynne specifically acknowledged "that the Commission has in the past 'sent out [such] letters,' " and that "drafts of . . . letters relating to the closing of investigations of gasoline price wars . . . [come] before the Commission for approval" prior to mailing (App., *infra*, p. 63) The Chairman thus made clear that the Commission took full responsibility for the Babcock letters and the interpretation embodied in them.

C. The Original Construction Was Formulated after a Careful Study of the Statute and a Thorough Investigation of the Alleged Discriminatory Practices.

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[10] See, *e.g.*, H. Rep. No. 1423, 84th Cong., 1st Sess. 18 (1955); S. Rep. No. 2810, 84th Cong., 2d Sess. 28 (1956); H. Rep. No. 2966, 84th Cong., 2d Sess. 170, 291 (1956); H. Rep. No. 2970, 84th Cong., 2d Sess. 63-64 (1957).

[11] See, *e.g.*, Hearings on Distribution Problems, *supra* at 457.

[12] Texaco has given price assistance to its service station dealers in reliance on this policy. This is reflected in a letter dated September 28, 1955, from Mr. S. C. Bartlett, Texaco's Vice President in Charge of Marketing, to Mr. Cash B. Hawley, President of the National Congress of Petroleum Retailers, Inc. (reprinted in Hearings on Price Discrimination, *supra* at 446; Hearings on Amending Section 2 of the Clayton Act, *supra* at 92-93). See also Hearings on the Gasoline Price War in New Jersey, *supra* at 394-395, 600-601.

The Babcock letters show that the Commission formulated its construction of Section 2(b) only after a careful study and thorough consideration of the statute itself, its legislative purpose and this Court's interpretation in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951). They further predicate the Commission's construction upon the evidence and information obtained from its investigations, which were themselves thorough and extensive. As Mr. Babcock noted in his letter of November 22, 1954, to Mr. Snow (App., *infra*, pp. 61-62):

> "The investigations heretofore conducted have required the use of more than a proportionate share of the available funds and personnel, and . . . the funds and time expended . . . demonstrate a sincere desire on the part of the Commission to fully utilize its statutory authority in an effort to eliminate any actionable unfair methods of competition or discriminatory pricing practices in the petroleum industry."

D. The Circumstances Under Which the Commission Later Abandoned its Original Construction of the Section 2(b) Defense.

After the District Court decision in *Enterprise Industries, Inc.* v. *The Texas Co.*, 136 F. Supp. 420 (D. Conn.), in October, 1955, Chairman Gwynne and various staff members of the Federal Trade Commission were called to testify before a Subcommittee of the Senate Select Committee on Small Business. They were asked whether the Commission

agreed with the interpretation placed on Section 2(b) by the District Court in *Enterprise*. Hearings on the Gasoline Price War in New Jersey, *supra*, at 450-451. They answered that on May 3, 1955, prior to the *Enterprise* decision, the Commission in a directive to its staff had laid down guide lines which were consistent with the interpretation in *Enterprise* (*id.* at 451).

On March 9, 1956, Chairman Gwynne addressed a letter to Senator Humphrey in which he outlined the shift in Commission policy on Section 2(b) (*id.* at 458-459, App., *infra*, pp. 63-64). The Chairman explained that, in March 1955, a member of the Commission had requested the General Counsel to express his views on the application and scope of Section 2(b). In April, 1955, the General Counsel had advised the Commission that, based on a study of the language and legislative history of Section 2(b), "he was of the view that a discrimination in price granted by a seller to a buyer to enable the latter to meet the prices of his competitors was probably outside the protection of section 2(b)" (App., *infra*, p. 64), although the General Counsel apparently gave no definitive view. For purposes of administration and staff guidance, "primarily in connection with the scope of staff investigations," the Commission adopted the General Counsel's tentative view "and directed that the memorandum discussing the application of section 2(b) be reproduced and distributed to appropriate members of the staff," and that letters sent out in response to complaints of price discrimination be revised in a manner "consistent with the view expressed by the General Counsel" (App., *infra*, p. 64). Although Chairman Gwynne noted that the District Court in *Enterprise* had reached the same conclusion, he avoided any

reliance on *Enterprise* as a controlling precedent.[13] Instead, he pointed out that "the views thus expressed and adopted are necessarily speculative," and that "a final determination by the Commission must await decision in specific cases." This determination ultimately would have to be "controlled by the facts as they are developed in the specific cases and ... the application of the law to the facts ..., after briefs are filed and oral argument is had." Even then, however, the Chairman opined that "perhaps the final answer must await a decision on this point by the Supreme Court ..." (App., *infra*, p. 64). Chairman Gwynne thus made it clear that the Commission was not prepared to make a definitive change of policy at that time but that a tentative change had been made solely for purposes of testing the scope of Section 2(b) in an actual litigated case.

This is such a test case.

Against this background, one would have expected a comprehensive and reasoned analysis from the Commission when it finally came to decide this controversial question of law on a full record in the present proceeding. Instead, in a singularly cavalier *ipse dixit*, it summarily rejected Sun's meeting competition defense on the basis of the

[13] In 1957, the Second Circuit, in an opinion by Judge Learned Hand, reversed the District Court in the *Enterprise* case on the ground that the plaintiff had failed to prove damages [240 F. 2d 457, *cert. denied*, 353 U. S. 965 (1957)]. Accordingly, the Court of Appeals noted that it was "not necessary to consider whether the defendant proved its defense under" Section 2(b) (*id.* at 460). In the course of the opinion, however, Judge Hand indicated his understanding of price war economics in the gasoline industry (*id.* at 458): "It is not uncommon in the industry for a filling station to start what has come to be known as a 'gas war'; that is, to cut the prevailing price of gasoline, which other competing stations must meet by a corresponding cut in order to keep up their sales; and that makes it important, if indeed not necessary, for the producing companies to reduce their prices to their own competing stations. . . ."

"plain wording" of the statute—never, of course, mentioning its prior inconsistent construction or bothering to explain how the statute had become any clearer with age.[14]

This is not the first time that the Commission has attempted to eat its words in the field of statutory construction. This Court rebuffed such an attempt in *Standard Oil Co.* v. *Federal Trade Commission*, *supra*, after Standard had pointed out that the position taken by the Commission was "a complete reversal of its former treatment of the defense" (see Brief for Petitioner, pp. 28-32). The Court, in refusing to endorse the new administrative construction, noted that prior "actions and statements of members and counsel of the Federal Trade Commission" had reflected a contrary understanding of the law (340 U. S. at 246). There was a like rebuff in *Federal Trade Commission* v. *Bunte Bros., Inc.*, 312 U. S. 349, 351-52 (1941).[15]

The Commission's "shift in its views" in the present case did not go unnoticed by the court below (R. 379 n. 42). Under the circumstances, it is hardly surprising that the Court of Appeals refused to bow to the Commission's "expertise" at the expense of "abdicat[ing] its judicial responsibility of construing the statute in the factual setting . . ." (R. 360). In holding that the Section 2(b) defense was applicable to the competitive situation presented, the lower court properly found "the Commis-

[14] The District Court's opinion in *Enterprise*, which the Commission cited as supporting its ruling, rises to no higher analytical level than the Commission's opinion. It, too, rests exclusively upon what the court conceived to be the "plain wording" of the statute.

[15] In *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396 (1956), the Court rejected an interpretation of the Internal Revenue Code of 1939 advanced by the Treasury Department, stating: "Against the Treasury's prior long-standing and consistent administrative interpretation its more recent ad hoc contention as to how the statute should be construed cannot stand."

sion's construction of the Act unnecessarily narrow, unrealistic in terms of the facts of life in marketing gasoline, and inconsistent with the purposes of the Robinson-Patman Act" (R. 360).

II.

The Commission's revised construction of the meeting competition defense is not dictated by the plain words of the statute.

As in its opinion below, the Commission attempts to justify to this Court its revised construction of the statute by looking to what it claims to be the "plain" words of Section 2(b). The only thing plain about the pertinent statutory language is that it is far from a model of clarity. The most eloquent testimony of its latent ambiguities is furnished by the Commission's own seesaw constructions. As the court below noted, "the language of Section 2(b) seems imprecise enough to support either interpretation" (R. 369).

What, for example, is plain about the word "competitor"? To be sure, a competitor is one who competes. But competition, besides varying in kind and degree,[16] occurs at different functional levels.

Moreover, Section 2(b) refers to meeting an "equally low price"—not "an equally low *lawful* price". Yet the word "lawful" has been read into the statute.[17]

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[16] See *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956).

[17] See, *e.g.*, *Tri-Valley Packing Ass'n*, FTC Dkt. Nos. 7225 and 7496, Trade Reg. Rep. ¶ 15,893 (May 10, 1962); *American Oil Co.*, FTC Dkt. No. 8183, Trade Reg. Rep. ¶ 15,961 (June 27, 1962); cf. *Federal Trade Commission* v. *Staley Mfg. Co.*, 324 U. S. 746, 759-60 (1945); *Standard Oil Co.* v. *Brown*, 238 F. 2d 54, 56-58 (5th Cir. 1956).

The words "equally low price" cannot be taken literally in still another respect, for they have a qualitative as well as a quantitative significance. The Commission itself has taken the position that, where a seller's product by reason of brand preference customarily sells at a somewhat higher price than the similar product of a lesser-known competitor, the seller, by meeting his competitor's price on the nose, is guilty of "beating" competition.[18]

A further problem concerns the word "purchaser." Although the Commission reads the word as referring to direct customers (Br. 21), the Commission has considered the same word in other parts of the statute as referring to indirect customers as well.[19]

The Commission argues that, if Congress had intended to permit the meeting competition defense to be invoked in the present case, it would have added the following italicized language to Section 2(b): ". . . made in good faith to meet an equally low price of a competitor *or of a competitor or competitors of such purchaser or purchasers* . . ." (Br. 22). It is equally arguable that, if Congress had intended the result urged by the Commission, it would have written: ". . . made in good faith to meet an equally low price of a competitor *which such competitor had offered to such purchaser*" (emphasis added).

The fact of the matter is that Congress did not say, as the Commission contends, that it "intended to refer only to the seller's competition, at his own level, for the business

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[18] See, *e.g.*, *Anheuser-Busch, Inc.*, 54 F. T. C. 277, 302 (1957), *rev'd on other grounds*, 289 F. 2d 835 (7th Cir. 1961). See also *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 236 (2d Cir. 1929), *cert. denied*, 279 U. S. 858 (1929); *Gerber Products Co.* v. *Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 920-21 (S. D. N. Y. 1958).

[19] See, *e.g.*, Brief for the Commission in Opposition, pp. 11-12, *American News Co.* v. *Federal Trade Commission*, No. 263, this Term, *cert. denied*, Oct. 8, 1962.

of those who buy directly from him" (Br. 21). As one commentator has pointed out, the statutory language is

> "the beginning rather than the end of the analysis. For in certain circumstances a rival's price *may* constitute competition for *both* the seller *and* buyer, which *both* must meet or lose the business on which *both* depend for their common survival."[20]

The problem, of course, with any exercise in textual analysis of the Robinson-Patman Act is that it tries to make literal sense out of a statute which has been variously described as "complex and anomalous,"[21] "prolix and perplexing,"[22] "obscure,"[23] "cryptic and sloppy,"[24] and "one of the most tortuous legislative pronouncements ever to go on the statute books."[25] Somewhat more charitably, this Court has observed that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 65 (1953).[26] With specific reference to Section 2(b), Judge Prettyman has said:

> "Misfits in words or phrases are not infrequently encountered when bills have been amended in the midst of debate or the floor of one or the other of

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[20] Rowe, *Price Discrimination Under the Robinson-Patman Act* 254 (1962).

[21] Markham, *The Report of the Attorney General's Committee on Antitrust Laws*, 70 Q. J. Econ. 193, 211 (1956).

[22] Attorney General's National Committee to Study the Antitrust Laws, *Report* 172 (1955).

[23] *Id.* at 175.

[24] Rowe, *Expectation Versus Accomplishment Under the Robinson-Patman Act, 1936-1960: A Statement of the Issues*, 17 A. B. A. Antitrust Section 298, 310 (1960).

[25] Dirlam & Kahn, *Fair Competition* 119 (1954).

[26] The Chief Justice reiterated this sentiment for a unanimous Court in *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 542 (1960).

> the Houses of Congress. This statute was amended on the floors of both Houses. It is not surprising that the final product is not perfectly meshed, as it might have been had it come undisturbed from the drafting board of a skilled draftsman."[27]

For this reason, it is necessary to go beyond "the infelicitous language"[28] of Section 2(b) in order to propound a statutory construction that would most accurately accord both with economic realities and the fundamental objectives of our antitrust laws.[29]

III.

The Commission's revised construction of the meeting competition defense is not supported by the legislative history of Section 2(b).

When the Commission limited the scope of Section 2(b) in its decision below, it did not cite any legislative history

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[27] *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499, 505 (D. C. Cir. 1961), *cert. denied*, 369 U. S. 888 (1962).

[28] *Automatic Canteen Co.* v. *Federal Trade Commission*, *supra*, 346 U. S. at 78.

[29] Cf. *United States* v. *Borden Co.*, 370 U. S. 460, 468 (1962), in which the Court noted that the cost justification defense was "literally susceptible" of one construction, but nevertheless adopted another construction more consonant with the legislative purpose; *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92, 96 (2d Cir. 1962), in which the court observed that the omission of "buyers" from the literal terms of Section 2(d) was more "'inadvertent' than 'studious'." See also *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365, 369 (2d Cir. 1958) ("of like grade and quality" inserted in Section 2(d)); *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 133, 134 (2d Cir. 1946), *cert. denied*, 331 U. S. 806 (1947) ("engaged in commerce" inserted in Section 2(e) and "purchasers" in Section 2(e) modified by "competing"); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 993, 994 (8th Cir. 1945), *cert denied*, 326 U. S. 773 (1945) (same); Rowe, *Price Discrimination Under the Robinson-Patman Act* 390-91 (1962).

as supporting its new view. But when it filed its petition for certiorari, the Commission argued that "[t]he legislative history of Section 2(b) supports the view that the Section 2(b) defense does not permit a seller to meet the competition of his buyer's competitor" (Pet. 11). Why this legislative history was not apparent to the Commission when it adopted its original contrary construction of the statute is a mystery—especially since the Commission had shortly before made an exhaustive review of the genesis of Section 2(b) in connection with its unsuccessful argument in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231 (1951). Even now the Commission concedes that legislative history "may not be conclusive on the question presented" (Br. 25).

The concession should have been more unequivocal. As this Court noted in the *Standard Oil* case, the legislative history of the meeting competition proviso "at best, *is inconclusive.*"[30] Similarly, as the court below observed, the legislative record merely contains "Delphic generalities but no evidence that Congress considered the specific question at issue" (R. 369).

Nevertheless, the Commission now purports to be illuminated by its examination of the legislative history—or at least by the House Report, since this is the sole Congressional source referred to in its brief (Br. 25-27). The House Report, of course, is nothing new; it is hardly a document which might have been previously overlooked and recently unearthed. The fact of the matter is that nothing in the House Report or any other legislative reference sheds light on the precise problem at hand.

Under original Section 2 of the Clayton Act, price discrimination was prohibited only if it might substantially

[30] 340 U. S. at 247 n. 14 (emphasis added).

lessen competition or tend to create a monopoly. Even then it was a defense if the discrimination occurred "in the same or different communities" and was "made in good faith to meet competition." See *Standard Oil Co.* v. *Federal Trade Commission, supra,* 340 U. S. at 240. Congressional dissatisfaction with the coverage of the statute as originally enacted culminated in the Robinson-Patman amendments of 1936. The basic shortcomings of the Clayton Act were summed up in almost identical terms by both the House and Senate committees in explaining the addition of a third standard of illegality in new Section 2(a):

> "The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injury in fact can the larger, general injury result."[31]

Under the third statutory standard, it would no longer be necessary to show that a price discrimination had the potential of rising to the level of a substantial lessening of competition or monopoly in the market as a whole. Section 2(a) now also reached discrimination "where the effect . . . may be . . . to injure, destroy, or prevent competition" among sellers, buyers, or their respective customers.

All of this, of course, has been known for years. Yet, it was not until the present litigation that the Commission perceived in this additional statutory standard in Section 2(a), and the accompanying legislative explanation quoted above, an intention on the part of Congress to narrow the substance of the meeting competition defense in Section

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[31] H. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936); accord, S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936).

2(b). The argument is a complete nonsequitur. It deliberately confuses Section 2(a) with Section 2(b).[32] Manifestly, to expand the offense is not to contract the defense.[33] On the contrary, there is no reason to assume that Congress intended to create an imbalance between the prohibition and the justification. If there be a need to meet competition, the defense should be recognized irrespective of the level of distribution at which the need arises. To be effective, the defense must be correlative with the offense.

By Section 2(b), Congress sheltered a discrimination in price when a seller showed "that his lower price . . . to any purchaser . . . was made in good faith to meet an equally low price of a competitor. . . ." The Commission interprets these changes in the meeting competition defense as a "'contraction' of the former proviso" (Br. 25). But, as *Standard Oil* makes abundantly clear, this "contraction" had an extremely limited effect:

> "The defense in subsection (b) . . . thus eliminates certain difficulties which arose under the original Clayton Act. For example, it omits reference to discriminations in price 'in the same or different communities . . .' and it thus restricts the proviso to price differentials occurring in actual competition. It also excludes reductions which undercut the 'lower price' of a competitor. *None of these changes, how-*

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[32] The Commission seeks to create the erroneous impression that the passage it quotes from the House Report manifests the congressional purpose in modifying Section 2(b) rather than Section 2(a) (Br. 27).

[33] An instructive analogy is provided by the amendment of Section 7 of the Clayton Act in 1950 by the Celler-Kefauver Act. The amendment made the statute applicable to asset acquisitions as well as stock acquisitions. See *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 316 (1962). But would anyone contend that by so doing Congress intended to eliminate or limit the "failing company" defense? See *United States* v. *Diebold, Inc.*, 369 U. S. 654 (1962).

> *ever, cut into the actual core of the defense.* That still consists of the provision that wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price. Actual competition, at least in this elemental form, is thus preserved."[34]

None of these changes in the meeting competition defense has the slightest bearing on the issue before this Court. Obviously this is a case of "price differentials occurring in actual competition," and there is no question here of "undercut[ting] the 'lower price' of a competitor."[35]

Since the Robinson-Patman Act did not eat into the "actual core" of the meeting competition defense—and it is that core with which we are concerned—the Commission can derive no comfort at all from the 1936 amendments. This it realized full well when it promulgated its original construction of Section 2(b) in the Babcock letters.

IV.

Upholding the meeting competition defense in this case accords with economic reality and is consonant with fundamental antitrust objectives.

A. The Lower Court's Construction of Section 2(b) Helps Foster Competition.

1. *The preferred position of meeting competition over uniform price treatment under the antitrust laws.*—The

[34] 340 U. S. at 241-42 (emphasis added); see *id.* at 247 n. 14.

[35] As the Commission points out in its brief (Br. 25 n. 17): "[T]he Commission affirmed the Examiner's finding . . . that Sun's purpose in granting the lower price . . . was to undercut . . . the price of Super Test. . . . The court below reversed on this issue . . . , and the Commission does not seek review of this ruling."

fundamental misconception that permeates the Commission's economic policy argument—once its unsound contentions respecting statutory language and legislative history are laid to rest—is that it erroneously assumes that uniform price treatment (or "equality of opportunity" (Br. 26), as the Commission prefers to call it) is the *summum bonum* of our antitrust jurisprudence and that meeting competition should be discouraged because it mars the symmetry of such uniformity. What the Commission has repeatedly failed to grasp is that competition, not price uniformity, is the overriding principle of antitrust law that governs our economic life—even though competition (as it invariably does) injures a competitor.[36] If the Robinson-Patman Act did not contain a meeting competition defense, the statute would be in hopeless conflict with the policy of the Sherman Act. The defense is absolute for a good reason; it represents paramount antitrust policy. Thus, we are not dealing with a defense which runs counter to established antitrust goals and which should therefore be construed narrowly; we are dealing with a defense which furthers those goals and should therefore be received hospitably. This was precisely the point which this Court made in the *Standard Oil* case.

In *Standard Oil*, the Commission had ruled "that the fact that the individual-service station operators had sus-

[36] "In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. 'Competition,' Mr. Justice Holmes observed, 'is worth what it costs.' We must always distinguish between injury to competition and injury to a competitor. To promote and protect competition is the primary function of the antitrust laws. However, we cannot guarantee competitors against all injury. This can only be accomplished by prohibiting competition." H. Rep. No. 1422, 81st Cong., 1st Sess. 5-6 (1949).

tained competitive injury as a result of the discrimination was alone sufficient to deprive the respondent of the Section 2(b) defense" (Br. 29).[37] This Court squarely rejected that ruling, for otherwise "the proviso would have such little, if any, applicability as to be practically meaningless" (340 U. S. at 250). In the Court's view, the Commission's interpretation struck at "the heart of our national economic policy [which] long has been faith in the value of competition" (*id.* at 248). The Court's precise holding was that, despite the fact that a discrimination in price may cause competitive injury, "it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor" (*id.* at 246). In so holding, the Court stressed the importance of Section 2(b) as a means of preserving competition (*id.* at 246-249):

> "Representatives of the Department of Justice have testified to the effectiveness and value of the defense under the Robinson-Patman Act. We see no reason to depart now from that interpretation.
>
> ". . . In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' "

The Court noted that several commentators had suggested "that, in theory, the Robinson-Patman Act as a whole is inconsistent with the Sherman and Clayton Acts" (*id.* at 249 n. 15). But the Court disclaimed the need to "now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts" (*id.* at 249) because it regarded

[37] See *Standard Oil Co.*, 41 F. T. C. 263, 282 (1945).

the meeting competition proviso as at least a means of partial reconciliation. Thus, the Court added (*ibid.*):

> "It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor."

In short, the Court gave effect to the manifest purpose of Congress to give priority to meeting competition over uniform price treatment. Even though price differences might injure buyers in their competition—and Section 2(b) presupposes such a showing under Section 2(a)—such differences were to be immunized by the meeting competition defense. As the Court put it: "Actual competition, at least in this elemental form, is thus preserved" (*id.* at 242).

Following the Court's decision in *Standard Oil*, unsuccessful attempts were made to obtain legislation limiting the meeting competition defense.[38] In July 1957, Judge Victor R. Hansen, then Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, testified against the proposed narrowing of the meeting competition provision:

> ". . . Standard Oil seems consonant with the Nation's antitrust policy. A seller's right to meet a competitor's prices by granting price differentials to some customers without reducing his prices to all must remain an essential qualification to any

[38] Even under the proposed bills, the meeting competition defense would remain a complete defense if the effect of the price discrimination was only "to injure, destroy, or prevent competition" with sellers, buyers or their respective customers, but would be inapplicable if the effect of the discrimination "may be substantially to lessen competition or tend to create a monopoly. . . ." See, *e.g.*, S. 11, 86th Cong., 1st Sess. (1959); H. R. 11, 86th Cong., 1st Sess. (1959).

> anti-price-discrimination law. For a seller constrained by law to reduce prices to some only at the cost of reducing prices to all may well end by reducing them to none. As the Federal Trade Commission in 1953 recommended to Congress: 'The right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competition and must be permitted in a free competitive economy.'[39]
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> "Anything less, I think would move the price-discrimination statute into irreconcilable conflict with the Sherman Act. . . .
>
> . . . . . .
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> "Thus, Standard Oil goes far to harmonize the Robinson-Patman Act with the basic tenor of antitrust policy."[40]

Judge Hansen's statement echoed the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws, which had hailed *Standard Oil* in the same language (p. 181).

2. *The Commission's hostility to the meeting competition defense.*—In the light of the Court's pronouncement in *Standard Oil*, one would have expected the Commission to have accorded the meeting competition defense the preferred position that it deserves in a competitive society. Instead, since the Commission's shift from the position

[39] This 1953 recommendation was made shortly before the Babcock letters were prepared and prior to the Commission's reversal of position. If we go back twelve years earlier we find an even stronger pronouncement by the Commission: "The right of self defense against competitive price attacks is as vital in a competitive economy as the right of self defense against personal attack." Federal Trade Commission, *The Basing Point Problem* 139 (TNEC Monograph No. 42, 1941).

[40] S. Rep. No. 2010, 85th Cong., 2d Sess. 52-53 (1958).

taken in the Babcock letters, it has consistently reacted as if *Standard Oil* had never been decided; it has not upheld the Section 2(b) defense in a single adjudicative proceeding.[41] Whenever the seller's need to meet competition conflicts with selling to his customers at identical prices, the Commission invariably decides in favor of price uniformity.

Perhaps the frankest exposition of the Commission's view—and one which obviously clashes head-on with the philosophy of *Standard Oil*—appeared in the brief which it filed with the Seventh Circuit in the *Sunshine Biscuits* case earlier this year. There it argued that Section 2(b) was "not written as the remedial portion of the Act intended to effectuate the Congressional will of preventing injury to competition," and that it is "an inconsistent proviso" which "must be strictly construed . . . , [for] the broader it is construed, the more inconsistent it becomes with the basic purposes of the amended Clayton Act." Brief for the Commission, p. 38, *Sunshine Biscuits, Inc.* v. *Federal Trade Commission*, 1962 Trade Cases ¶70,394 (7th Cir. 1962).

In *Sunshine Biscuits*, the Commission had ruled that a seller may not meet competition by matching a competitor's price if the sale would be to a new, rather than existing, customer. The Seventh Circuit reversed, stating (1962 Trade Cases at p. 76,608):

> "That the distinction between old and new customers is economically unsound and would defeat the purpose of the Robinson-Patman Act seems obvious. . . . [Under this distinction] competition for new customers would be stifled and monopoly would be fostered. In such situations an established

[41] Indeed, the only reported decision we have found in which the Commission sustained the meeting competition defense was an alternative holding handed down 25 years ago. *Shefford Cheese Co.*, 25 F. T. C. 1209, 1212 (1937).

> seller would have a monopoly of *his* customers and a seller entering the market would not be permitted to reduce his prices to compete with his established rivals unless he could do so on a basis such as cost justification."

Another graphic illustration of the Commission's desire to read the meeting competition defense out of the Act was its decision in *Exquisite Form Brassiere, Inc.*, FTC Dkt. No. 6966, Trade Reg. Rep. ¶29,195 (Oct. 31, 1960).[42] Although the defense concededly applied to violations of Section 2(e), under which the seller *renders* promotional services or facilities to his buyer, the Commission held that the defense was unavailable in a Section 2(d) case, where the seller *pays for* such services or facilities rendered by the buyer. On appeal, the Court of Appeals for the District of Columbia Circuit rejected the Commission's wooden reading of the statute, declaring:

> "The economic evil sought to be outlawed by . . . [the statute] is the same whether the services and facilities are furnished to the customer or by the customer with reimbursement, so long as discrimination is practiced. Congress was here dealing with a fundamental economic concept; it was not shadowboxing or indulging in fine semantic shadings."[43]

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[42] Accord, *Henry Rosenfeld, Inc.*, 52 F. T. C. 1535, 1552 (1956); *J. H. Filbert, Inc.*, 54 F. T. C. 359, 364 (1957); *Admiral Corp.*, 55 F. T. C. 2078 (1959); *Shulton, Inc.*, FTC Dkt. No. 7721, Trade Reg. Rep. ¶29,783 (July 25, 1961), *rev'd*, 1962 Trade Cases ¶70,321 (7th Cir. 1962), *modified*, 1962 Trade Cases ¶70,393 (7th Cir. 1962).

[43] *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499, 502 (D. C. Cir. 1961), *cert denied*, 369 U. S. 888 (1962); accord, *Shulton, Inc.* v. *Federal Trade Commission*, 1962 Trade Cases ¶70,321 (7th Cir. 1962), *modified*, 1962 Trade Cases ¶70,393 (7th Cir. 1962).

The Commission recently delivered another blow to the meeting competition defense in *American Oil Company*, FTC Dkt. No. 8183, Trade Reg. Rep. ¶15,961 (June 27, 1962), and in *Tri-Valley Packing Ass'n.*, FTC Dkt. Nos. 7225 and 7496, Trade Reg. Rep. ¶15,893 (May 10, 1962), holding that the respondents had to prove that in meeting competition there was reason to believe that the prices of their competitors were lawful, rather than merely show that there was no reason to believe that such prices were unlawful. But as Commissioner Elman pointedly replied in his *Tri-Valley* dissent (Trade Reg. Rep. at p. 20,706):

> "Where a seller in an active market . . . invokes the meeting-competition-in-good-faith defense allowed by Section 2(b), considerations of elementary fairness . . . preclude imposition on him of a heavier burden than showing that he had no reason to suppose that the competitive lower prices he was meeting were unlawful. The law should not be construed as forcing a seller to compete at his peril. . . . [I]f the statute is not to be made an impediment to free and fair price competition, the lower price met by a seller in good faith in a competitive situation should be deemed to be lawful if the seller shows that he neither knew nor had reason to believe that it was unlawful, *and* if no counter-showing is made of facts known to the seller which would indicate to a reasonable and prudent businessman that the lower price was probably unlawful."[44]

[44] Similarly in *American Oil*, Commissioner Elman observed in dissent that (Trade Reg. Rep. at p. 20,796): " 'Good faith' does not require businessmen to be put in the impossible dilemma of either (1) losing business by not meeting competitors' lower prices, or (2) meeting the competitive lower prices and running the risk that years later the Commission will find these 'third-party' prices to be unlawful, after complex and protracted proceedings whose outcome could not confidently be predicted even by legal experts specializing in the field of trade regulation."

No one can deny that the Commission's stand in the present case is in the mainstream of its hostile approach to the meeting competition defense in Robinson-Patman Act cases. The blunt truth of the matter is that the Commission administers the statute as if it did not contain a meeting competition defense. Notwithstanding the *Standard Oil* decision, the Commission evinces preoccupation with injury to competitors and fails to recognize the primacy of the need to meet competition. By insisting on proof of an actual offer to the seller's customer—something it knows does not accord with economic reality in the marketing of gasoline—the Commission would suppress meeting competition in the gasoline industry. That this would indeed be "the practical effect of adopting the Commission's view" was squarely recognized by the Court of Appeals (R. 370).

3. *The economic realities of the gasoline industry.* The principal competition among gasoline suppliers is not at the wholesale level in vying for daily sales to retail outlets. Rather, the suppliers compete for the motorist trade through their dealers at the retail level because of "the nature of gasoline, the necessity for its bulk merchandising, the responsibility of the refiner or supplier for advertising, [and] the dependent relation of the supplier on its dealers and the dealers on a single supplier . . ." (R. 370). The nature of this competition in the gasoline industry was accurately described by the court below (R. 371):

> "The gas station retailer is a rare bird among retail merchants. His business is built around pumps which can be used for his supplier's gasoline. Sun sells Sunoco in pumps that say 'Sunoco'. Its competitor at 19th and Pearl in Jacksonville, Super Test,

sells its gas in pumps that say 'Super Test'. Sunoco gasoline flows unchanged from Sun through Sun pumps to motorists. Sun, not some small retailer, bears the primary responsibility for advertising and for puffing Sunoco against Super Test and other gasolines even though the sales which are competitive take place at the consumer level. . . .

"As Mr. Justice Jackson has pointed out: 'Retailers' storage capacity usually is limited and they are in no position to accumulate large stocks. They can take gas only when and as they can sell it'. [Dissenting opinion in the *Standard Stations* case, *Standard Oil Co.* v. *United States*, 337 U. S. 293, 323, (1949)]. The suppliers, therefore, must maintain gasoline stocks to meet the needs of the ultimate consumer—the motorist; and a service station, therefore, primarily is what the word indicates—a *service* station. In gasoline marketing the supplier simply cannot be cut off from the filling station operator and treated as if it competed only for the business of filling stations; oil companies compete with each other for the consumer's business."

Mr. Justice Jackson, dissenting in the *Standard Stations* case, made these further pertinent observations (337 U. S. at 323):

"[T]he retailer in this industry is only a conduit from the oil fields to the driver's tank, a means by which the oil companies compete to get the business of the ultimate consumer—the man in whose automobile the gas is used. . . . The retail stations, whether independent or company-owned, are the instrumentalities through which competition for this ultimate market is waged."

Many economists and students of the industry have voiced similar views.[45]

What the Commission would require to invoke the defense—a direct offer by Super Test, Sun's competitor, to McLean, Sun's customer—is not the way that Super Test or any other oil company competes. Since one Super Test station was sufficient to handle the potential custom at 19th and Pearl Streets in Jacksonville, Super Test would hardly offer its gasoline to McLean, and McLean would hardly agree to become the second Super Test station at that corner. Although there is keen competition among the oil companies for service station outlets in the first instance,[46] once such outlets have been obtained and are handling the gasoline of a particular supplier, it is rare that another supplier would want his products to be sold at the same

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[45] See, *e.g.*, Cassady, *Price Making and Price Behavior in the Petroleum Industry* 236-238 (1954); Cassady & Jones, *The Nature of Competition in Gasoline Distribution at the Retail Level* 70-74, 89-92, 108-12 (1951); De Chazeau & Kahn, *Integration and Competition in the Petroleum Industry* 476, 480 (1959); 1 Whitney, *Antitrust Policies* 125-26 (1958). See also a discussion of the relationship of dealer to supplier in the record (R. 212-17, 250-51).

[46] The Commission's contrary implication (Br. 34-35) is plainly unwarranted. In *Osborn* v. *Sinclair Refining Co.*, Civ. No. 9769 (D. Md. 1959), the District Court made a specific finding that "[a]t all times pertinent in this case, experienced and efficient service station operators were greatly in demand, and the number of such experienced and efficient operators available was substantially less than the number of stations available. All major Oil Companies were in active competition to obtain the services of experienced and efficient service station operators" (Finding 76). The District Court's opinion (171 F. Supp. 37) was subsequently reversed on other grounds [286 F. 2d 832 (4th Cir. 1961), *cert. denied*, 366 U. S. 963 (1961)]. In *United States* v. *Sun Oil Co.*, 176 F. Supp. 715 (E. D. Pa. 1959), the District Court similarly observed (176 F. Supp. at 720) that "new competitors seek to establish their own outlets, either by erecting new stations or by winning existing wholesale distributors or retail dealers from other suppliers."

station with a competitive gasoline. And it is just as rare that the dealer will want a split-pump operation.[47]

The Commission does not dispute that these are the facts of economic life in the gasoline industry. Quite the contrary, the Commission itself emphasizes the conduit type of competition prevailing in the industry when it questions the "independence" of the retail service station dealer (see Br. 6 n. 4, 9 n. 3, 34-35). What the Commission says is that Section 2(b) was never intended to cover such an industry because "the likelihood that the objective requirements of the Act will or will not be met in any particular situation certainly provides no basis for writing new exceptions to the Act; such an interpretation not only renders the statute unworkable and indefinite but reopens the debate on basic economic policy that Congress sought to resolve by passing the Act" (Br. 45 n. 27).[48]

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[47] Split-pump stations sell more than one brand of gasoline. "There are relatively few 'split-pump' arrangements left in most market areas." Cassady, *Price Making and Price Behavior in the Petroleum Industry* 58 n. 23 (1954); see 1 Whitney, *Antitrust Policies* 129-30 (1958). In *United States* v. *Sun Oil Co.*, *supra*, the District Court pointed out that over 99% of the branded gasoline purchased by the motoring public in the relevant market was dispensed at stations which carried the products of a single supplier (176 F. Supp. at 720), and indeed specifically acknowledged that "Sun's marketing practice with respect to gasoline does not foreclose all its competitors from selling their brand of gasoline at Sun's independent dealer stations for such competitors choose not to sell to Sun dealers" (*id.* at 727).

[48] The Commission attempts to provide a second answer as well. Despite the fact that Judge Wisdom pointed out that the "gas station retailer is a rare bird among retail merchants" (R. 371), the Commission states that "*all* producers of consumer goods . . . distribut[e] . . . their product to the public through the 'conduit' of retail outlets, which may or may not handle the products of competing producers . . ." (Br. 36). But surely the Commission must recognize the manifold differences between a service station flying the colors of a single gasoline supplier and an ordinary retail outlet offering side by side a variety of competing brands of the same product. Clearly, Mr. Justice Jackson in the *Standard Stations* case had no difficulty in seeing the distinction.

This argument, of course, presupposes that Congress preferred price uniformity to competition when it enacted the meeting competition proviso as a complete defense to a charge of price discrimination, whereas precisely the opposite is true. Allowing Sun to have the benefit of the meeting competition defense neither writes a new exception into the Act nor reopens the debate on basic economic policy. Nor does it render the statute unworkable or indefinite. As *Standard Oil* makes clear, the meeting competition defense is absolute wherever a seller reduces his price in good faith to meet the lower price of a competitor. In view of the conduit nature of competition in the gasoline industry, one would have to ignore plain economic realities to deny that Sun's allowance to McLean was for the purpose of meeting the lower price of Super Test--Sun's own competitor, as well as McLean's.

In an effort to prove that its revised construction of the statute is consistent with *Standard Oil*, the Commission argues that "[t]he Court's entire discussion of the Section 2(b) defense was in terms of a seller's matching a lower price *actually offered* to his customer by one of his (the seller's) competitors" (Br. 29), whereas "no competitor of Sun had offered its buyer, McLean, a lower tank-wagon price for gasoline . . ." (Br. 30-31).

To be sure, the Court in *Standard Oil* spoke of a competitive offer, but that was in a factual context—sales to jobbers—in which there were such offers. Nothing in *Standard Oil* indicates that a competitive offer to the favored customer is a *sine qua non* to invoking the meeting competition defense where such offers do not exist because the immediate price competition which must be met occurs at the next level of distribution. The Commission itself never recognized any such requirement in *Standard Oil*

when it promulgated its original construction of Section 2(b) in the Babcock letters. At that time apparently it was more impressed by the Court's further observation that "*wherever* a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price" [340 U. S. at 242 (emphasis added)].

In the present case, it is indisputable that Super Test's price threatened "to deprive" Sun of McLean as a customer by driving him out of business. Super Test's price also threatened "to deprive" Sun of retail sales through McLean to the motoring public. Sun could have waited until doomsday, and Super Test would still not have offered its gasoline to McLean for resale at his Sun station. To nevertheless require such an offer as a condition precedent to permitting Sun to meet Super Test's competition is tantamount to saying that Sun cannot defend itself at the economic level at which it competes; to use Judge Wisdom's expression, Sun and McLean must remain "sitting duck[s]" (R. 354). "Clearly, a seller's need for a lower price in response to a decrease in his sales is the same whether the decrease occurs because his purchasers switch to a price cutting competitor or because they are unable to protect their share of the retail market from distributors of a rival product." Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L. J. 935, 939 (1957). Since Sun admittedly could have invoked Section 2(b) had Super Test attempted to increase its market share by offering gasoline to McLean at a lower price, Sun should be able to invoke the defense when Super Test attempted to increase its market share by undercutting McLean. Sun's defensive lower price to McLean and McLean's subsequent lower price

to the motoring public, in fact, met "in good faith *their mutual competitor's* equally low price at the pump."[49]

By allowing Sun the benefit of the meeting competition defense, the court below plainly helped promote competition at the retail level. Sun's allowance to McLean was meant to preserve McLean as a competitor at the corner of 19th and Pearl as well as to preserve Sun's competition with Super Test through McLean at that location. The only answer the Commission has is that Sun's action was not successful (Br. 48). But this is beside the point. Success is not the measure of the statutory defense. Had Sun not acted so hesitantly in granting the price allowance, McLean might still be in business today.

We wish to underscore the extreme nature of the Commission's argument. Not only is it contending that a seller may only meet a competitive price at his own level and may not assist his customer to meet competition at the customer's level; it is contending that the seller may not even reduce his price to a customer to meet competitive prices at the seller's own level unless there has been an actual offer of a lower price to that customer. If such an offer were a condition precedent to meeting competition at the seller's level, this would mean that a seller doing business in more than one geographic market could not meet a competitor's publicly announced general price reduction in but one of those markets. In the case of each of his customers, the seller would have to wait on the side lines until his competitor had raided that specific customer and then hope to arrive on the scene in time to match the lower competitive offer, rather than defend his business once the competitor's

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[49] Rowe, *Price Discrimination Under the Robinson-Patman Act* 255 (1962).

general price reduction had become known in the market. Thus, the only safe way for the seller to maintain his sales in the market where his competitor was quoting the lower price, without risking liability for territorial price discrimination, would be for him to reduce his price to the same level in all of his markets. It is inconceivable that Congress ever intended to place competitors in such a strait jacket. The statute speaks of meeting the equally low price of a competitor; it says nothing about offers. A publicly announced price of a competitor is his price. As a matter of business economics, if there is to be competition in the marketplace, there must be a right to match a competitor's area prices as well as his direct offers to specific customers. Cf. *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 366 (9th Cir. 1955), *affirming* 104 F. Supp. 796, 807 (S. D. Cal. 1952), *cert. denied*, 350 U. S. 991 (1956).

4. *The difference between meeting competition and predatory price cutting.*—The Commission advances the novel argument that the decision below, instead of promoting competition, will impede detection of predatory price behavior. Its theory is that "when the Section 2(b) defense is applied without regard to the levels on which competition is conducted, there is no sure measure of either the purpose of a price cut or the extent to which the one price is actually 'responsive' to another" (Br. 43).

In light of this argument, one would think that Sun rather than Super Test made the price raid on McLean, that Sun rather than Super Test put McLean out of business, and that Sun rather than Super Test won the price war at 19th and Pearl Streets. It may be that "localized price-cutting by a large firm for the purpose of driving

a smaller firm out of business" is "one of the oldest and most insidious of predatory practices" (Br. 32). But the question is wholly academic here. There is no question but that Sun acted in complete good faith in its effort to save its dealer by meeting—not beating—competition. Even the Commission grudgingly admits that "Sun was not the first to cut its prices" and that "its action was apparently intended to be responsive to price cuts by the Super Test station across the street from its dealer, McLean" (Br. 43). Sun's response was the antithesis of predatory pricing—a carefully studied lower price to a single dealer in contrast to a reckless general price slash. The only conceivable criticism that can be leveled against Sun is that, in its desire to make certain that the facts warranted action, it waited too long.

The Commission, of course, prefers to shy away from the present record and conjure up a chamber of horrors for the future. But it fails to give concretion to its fears. Since it is transparently clear that Sun had a legitimate motive in meeting competition here, why assume that the purpose of other gasoline suppliers will be obscure in other price war situations? Since it is equally evident that Sun's wholesale price allowance was actually responsive to Super Test's price cut at the retail level, why assume that such responsiveness will be less demonstrable in other cases? The Commission need have no concern that, because "the wholesaler is not responsible for the exact price set by the retailer[,] there can be no objective basis for deciding that the seller's purpose in granting the discriminatory price was to undercut a retail competitor, even though that may be what the dealer actually does" (Br. 24-25). If McLean had used Sun's competitive allowance to undercut Super Test—a readily demonstrable

fact—Sun obviously would not have been acting in good faith if it had continued to grant the allowance.[50] What is more, the burden of establishing a Section 2(b) defense is on the respondent, not the Commission. Hence any problems of proof on this issue are those of the seller who asserts that he met competition in good faith.

Significantly, the Commission cites no evidence to show that a localized price cut by a major gasoline supplier was ever used to drive smaller independent gasoline marketers out of business. On the contrary, during the late 1940's and early 1950's, when the Commission accorded the oil companies the benefit of the meeting competition defense, the non-majors nevertheless prospered and flourished. Their number grew; their sales volume increased; their share of the market expanded.

In 1957, Subcommittee No. 5 on Distribution Problems stated in its Interim Report to the House Select Committee on Small Business that "[a]n increasing and major factor in petroleum marketing is the phenomenal growth in recent years of the multiple-pump, unbranded retail dealer." H. Rep. No. 1157, 85th Cong., 1st Sess. 13 (1957). Business Week (May 17, 1955, p. 66) cited an estimate that "the independents accounted for 10% of total national gallonage of gasoline 10 years ago; today, nearly 25%." This finding was supported by National Petroleum News (May 1958, p. 137), which noted that estimates of gallonage for the independent non-major companies "in some key markets rose from 15% to 50%." De Chazeau and Kahn also attest to this remarkable growth by citing a "survey of the market share of 'local brands' in 182 local retail markets

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[50] Sun in fact would not continue to grant the allowance under such circumstances (R. 285).

for 1955 and 1956" prepared by the Shell Oil Company.[51] The survey "showed thirty-two markets in which . . . [the independents'] share amounted to 30 per cent or higher in . . . [1956], with more increases than decreases compared with 1955. The median shares in 1955 and 1956 were 7.5 and 8.7 per cent in Shell's East Coast Division, 24.6 and 27.1 per cent in the Midwest, and 15.8 and 17.6 per cent on the West Coast . . . ."[52] These figures certainly belie the notion that the availability of a meeting-competition defense in the gasoline industry exposes the smaller oil companies to predatory price attacks by their larger competitors.

The figures do more. They attest to the vigor and intensity of competition in the gasoline industry—an industry composed of a large number of sellers effectively vying for the custom of buyers. The Hearing Examiner in this case, referring to conditions in 1955-56, expressly recognized that competition in the sale of gasoline is extremely keen (R. 21, 22-23). This observation applies with even greater force today.

In making its predatory pricing argument, the Commission again betrays its failure to recognize the role of the meeting competition defense as a vital force in our competitive society. Far from encouraging predatory price cutting, the defense is designed to permit a seller confronted by "a price raid by a competitor"[53] to protect itself in the competitive struggle. This is true irrespective of the size of the seller making the raid or the size of its target.

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[51] De Chazeau & Kahn, *Integration and Competition in the Petroleum Industry*, 540 n. 21 (1959).

[52] *Ibid.*, *see* H. Rep. No. 1157, *supra* at 14. See also De Chazeau & Kahn, *supra* at 100; Cassady, *Price Making and Price Behavior in the Petroleum Industry* 66 (1954).

[53] *Standard Oil Co.* v. *Federal Trade Commission*, *supra*, 340 U. S. at 249.

There is all the difference in the world between a policy of predatory price cutting and one of lowering prices in self-defense. And there is no reason to suppose at this late date that the courts have lost their ability to distinguish between the two.

B. The Lower Court's Construction of Section 2(b) Helps Protect the Small, Independent Businessman.

In addition to fostering competition, the right of a supplier to meet competition in a price war at the retail level also furthers the purpose of the Robinson-Patman Act to promote local ownership and protect the small, independent businessman.

1. *The consequence of allowing the burden of price wars to fall on the small retail dealer.*—The Commission's argument focuses on the four Sun dealers (Perry, McClung, Crabtree and Winning) who supposedly suffered competitive injury within the meaning of Section 2(a), rather than on the Sun dealer (McLean) who was threatened with business extinction by Super Test's price aggression and therefore needed protection under Section 2(b). Although the Commission does not deny that McLean was in fact driven out of business by Super Test, it says that one victim is better than four.

Even if the Commission's arithmetic were unimpeachable, its conclusion would still be wrong. As pointed out in *Standard Oil*, the determination of who is to sustain competitive injury, if any, and who is to be protected, was made by Congress by its very inclusion of the meeting competition defense in the statute.

In point of fact, however, despite the Commission's claim of actual competitive injury to Sun's four other dealers in the form of a diversion of business, the court

below noted that "it would seem impossible to say whether they suffered a loss of gallonage from Sun's price allowance to McLean or from Super Test's aggressive price cutting" (R. 366). What is more, any gallonage loss by these four dealers, who were about one to three miles away from 19th and Pearl Streets where the price war was raging, was trivial compared with the mortal blow struck at McLean.[24]

Moreover, it should be remembered that price discrimination is prohibited by Section 2(a) without proof of actual injury to competition; potential injury is enough. Hence, to accept the Commission's argument is to give greater weight to the *potential* injury of buyers who do not receive the allowance than to the *actual* injury of the buyer whose economic survival may well depend on receipt of the allowance.

Even if there were facts in the record to show actual injury to the four other dealers, there is no reason to assume that these dealers would have fared better if Sun had not given McLean a price allowance. Clearly, if competitive harm did occur to the other Sun service stations, it originated not with Sun's price allowance to McLean but with Super Test's price cuts. So long as Super Test continued to sell gasoline below the price of the other

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[24] Obviously, neither Sun nor any other oil company would sacrifice four dealers to save one. The cases cited and quoted in the Commission's brief (p. 11) that some of these four Sun dealers went out of business because of Sun's allowance to McLean. The record conclusively demonstrates that this is not so. McClung ceased operating as a Sun dealer in the latter part of January, 1956, because he was a poor credit risk and did not have funds to purchase gasoline (R. 127-28). Peery notified Sun of his intention to terminate his dealership in mid-November, 1955, more than one month before Sun's allowance to McLean (R. 51, 337), and Peery ultimately went out of business in September, 1956, seven months after the assistance to McLean had terminated (R. 52). Crabtree likewise gave up his dealership in September, 1956 (R. 143).

dealers in the area—including Sun's—those dealers, if in retrospect they lost business, would have lost it whether or not Sun granted a price allowance to McLean. What the Court said in *Standard Oil* is equally applicable to the competitive situation at 13th and Pearl Streets (340 U. S. at 250):

> "[I]t must have been obvious to Congress that any price reductions initiated by a seller's competitor would, if not met by the seller, affect competition at the beneficiary's level or among the beneficiary's customers just as much as if those reductions had been met by the seller."

If we grant the Commission's premise that the answer to the question presented should turn on a counting of dealers' noses, then the meeting competition defense should not be available to Sun even if Super Test had actually offered a lower price to McLean in order to win his business. Under these circumstances, the competitive injury, if any, to the other four Sun dealers as a result of Sun's lower price to McLean would have been exactly the same as in the present case. Yet the Commission says that it would have honored the defense if such an offer had been made (Br. 27, 59). Patently, this elevates form over substance.

The Commission would have been satisfied, and there would have been no proceeding here, if Sun had done nothing and allowed the whole burden of the price war to fall directly on McLean. But how would this promote the welfare of the small businessman? Without financial assistance from their suppliers, the McLeans cannot survive against the price forays of powerful chains like Super Test.[55] The resources of the average retail dealer simply are not large enough to enable him

[55] See Cassady, *Price Making and Price Behavior in the Petroleum Industry* 275-76 (1954).

to hold out for the duration of any long drawn out price war" (R. 376).[58]

2. *The "competitive" area with the need allowances to all dealers.*—The Commission denies that its decision leaves Sun and certain of its dealers helpless in the face of price competition by independents" (Br. 37). It suggests as an alternative that "Sun might have responded with a price cut to all its dealers in the competitive area" (Br. 38). But the Commission carefully sidesteps indicating what the competitive area is. Does it have in mind only the four other Sun dealers besides McLean who were supposedly injured? Does it mean the eight Sun dealers who "were in the territory which comprised the northern one-third of Duval County, in which Jacksonville is located"? Or perhaps the "[t]hirty-eight service station operators . . . selling Sun products in the Jacksonville, Florida, area"? Or the "approximately 200 service stations in the region that included Florida"? (Br. 6). Or maybe even the 6,984 dealers which Sun had throughout the country? (Br. 5 n. 3). Where does the Commission want Sun to draw the line?

Experience has shown that no matter what geographic area an oil company selects in which to reduce its prices in a price war situation, the Commission invariably complains. Thus in the *American Oil Co.* case, *supra*, the Commission found that the respondent had discriminated in price against its Marietta, Georgia, dealers by granting allowances to its dealers in Smyrna, a city several miles to the

[58] The same point was made by Commissioner Elman, dissenting in *American Oil* (*supra*, Trade Reg. Rep. at p. 20,793): "Unless he received these . . . [competitive price allowances] from his supplier, a particular dealer would not be able to survive very long. If he had to pay more for gas than the price at which a station across the street was selling a competing brand, a dealer would not be likely to stay in business."

north. In the *Texaco* case, *supra*, the Commission complained that Texaco's general allowance to all its dealers in Portsmouth, Virginia, discriminated in price against its other dealers across the Elizabeth River in the separate cities of Norfolk, South Norfolk and Virginia Beach. Yet in *Sun Oil Co. (Norfolk)*, FTC Dkt. No. 6934 (Initial Decision May 17, 1962), the Examiner found that Sun's consignment plan, by which the company lowered the prices of all its dealers in the same Virginia cities, went beyond what was considered the area of effective competition.

In the *American Oil* case, Commissioner Elman in his dissent highlighted the dilemma which, under the Commission's view of dealer competition, an oil company faces in attempting to cope with a gasoline price war (Trade Reg. Rep. at p. 20,795):

> "If American had chosen to give equally large discounts to its Marietta dealers, where could it have safely stopped? Smyrna and Marietta are located along a major north-south highway with gasoline stations in every town along the way. A price cut to any station or group of stations would be bound to affect the sales of nearby stations up or down the road, and if American made its reductions to all stations on this highway there would undoubtedly be effects upon stations located on adjacent and intersecting roads. Under the Commission's theory American's only safe alternative would be to reduce its prices to all of its dealers everywhere. But is the Commission prepared to say that this enlargement of a local brush fire into a nuclear price war would have effects upon competition less injurious than those of the course of action which American actually pursued?"

The answer to Commissioner Elman's question was given by Judge Wisdom in the present case (R. 377):

> "[T]he Commission would have Sun enlarge the scale of the price war and risk a chain-reaction that

> might set off price wars throughout Florida and Southeast United States. . . . [O]ther oil companies, majors and non-majors, would have to meet Sun's price-cuts thereby spreading price wars and subjecting the margins of filling station operators to further compression."

To this, the Commission replies that after Sun's price allowance to McLean, a general price war broke out throughout the Jacksonville area anyhow. And it simultaneously asks: "Is there any basis for supposing that a general price cut within the competitive area could have affected sound economic conditions *more* adversely?" (Br. 38).

In the first place, there is no evidence that Sun's allowance to McLean on December 27, 1955, was the cause of the general price war. Quite the contrary, the general war developed only after Super Test further reduced its price on February 16, 1956. Only then did various other suppliers reduce their tank wagon prices. Sun thereupon felt compelled to drop its own tank wagon price to all its dealers in the area (R. 357).

Just because a generalized price war ultimately developed, with retail prices eventually plummeting to 19.9¢ per gallon, does not mean that Sun's attempt to limit the war to the corner of 19th and Pearl was as bad as, or worse than, an initial cut to all dealers "in the competitive area" would have been. On the contrary, the latter would have guaranteed an instantaneous and widespread price war. At least there was hope that the cut to McLean alone would confine the price disturbance.

Any immediate across-the-board cut, and its concomitant full-blown price war, would have worked greater competitive injury to Sun's dealers than the measure that Sun actually adopted. Although a general lowering of Sun's tank wagon price would have enabled its dealers to reduce

their pump prices and increase their gallonage at the expense of competing brand stations maintaining higher prices, this advantage would have been a fleeting one. The other oil companies obviously would not have stood by idly while their business evaporated. They would have responded by dropping their own tank wagon prices to keep themselves and their dealers competitive. At this point the Sun dealers would have been pumping their normal gallonage at a lower retail price and *at a lower profit margin* because the dealers themselves (as the record shows) would have absorbed part of the cost of the price war. How the Commission hopes to protect the small businessman by broadening the area of price wars is difficult to understand.

Wholly apart from the faulty economics underlying its general price cut proposal, the Commission ignores the law. Specifically, it blinks its eyes at the fact that the Robinson-Patman Act does not require a seller to choose "between ruinously cutting its prices to all its customers . . . or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." *Standard Oil Co.* v. *Federal Trade Commission*, *supra*, 340 U. S. at 250. The Attorney General's National Committee to Study the Antitrust Laws was far closer to the mark than the Commission when it said that "a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*" (*Report*, p. 181).[57]

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[57] This was precisely the point of view later expressed by the Department of Justice in successfully opposing proposed legislation that would have narrowed the meeting competition defense (see *supra*, pp. 28-29).

3. *The prospect of vertical integration.*—As an alternative solution, the Hearing Examiner, with the approval of the Commission below, suggested that in order to "meet . . . competition at the dealer level" the supplier might change its method of distribution "by operating its own stations and thus being in direct competition with other stations which reduce prices" (R. 24, 43). The suggestion, in other words, was to vertically integrate and "bury the small, independent filling station retailer" (R. 376).

The Commission now disavows this solution. It points out that previously Sun as well as other oil companies had owned and operated their service stations but that they had shifted over to a lessee-dealer program to avoid the impact of chain stores taxes, social security, labor legislation, and the like (Br. 6, 54). And the Commission doubts, in view of these considerations, that the oil companies will revert to vertical integration at the retail level (Br. 54).

But the fact of the matter is that the Commission's concerted attack upon the meeting competition defense has already induced certain oil companies, including Sun, to adopt a form of vertical integration—a consignment method of distribution by which the company, as the owner of the gasoline, sets the retail price posted by its consignee dealers.[58] Mr. Justice Douglas predicted as much, albeit in a different legal context, in his *Standard Stations* dissent (337 U. S. at 320):

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[58] Such a consignment arrangement was upheld in *Simpson* v. *Union Oil Co. of California*, 1961 Trade Cases ¶69,936 (N. D. Cal. 1960) and by a hearing examiner in *Atlantic Refining Co.*, FTC Dkt. No. 7471 (Initial Decision March 7, 1962). A similar arrangement, however, was invalidated by another examiner in *Sun Oil Co. (Norfolk)*, *supra*. The move to consignment arrangements clearly indicates, contrary to the Commission's argument (Br. 54), that oil companies are quite willing to assume "responsibility for the retail price."

> "The elimination of these requirements contracts sets the stage for . . . oil companies to build service-station empires of their own. . . . The formula suggested . . . is either the use of the 'agency' device, which in practical effect means control of filling stations by the oil companies . . . or the outright acquisition of them by subsidiary corporations or otherwise. . . . [E]ither of those devices means increasing the monopoly of the oil companies over the retail field.[59]

The well-known fact that the oil companies had shifted away from vertical integration in the past did not signify to Mr. Justice Douglas that they would not revert to their former method of operation under sufficient economic compulsion.

The Court is not called upon to decide whether the independence of retail gasoline dealers today is ideally perfect. The fact remains that under a dealership arrangement large groups of individuals with small capital have the opportunity of becoming entrepreneurs; otherwise, they would be mere employees. As the District Court stated in *Susser* v. *Carvel Corp.*, 206 F. Supp. 636, 640 (S. D. N. Y. 1962):

> "The franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain. The franchise system of operation is therefore good for the economy."

Inherent in the Commission's rejection of the meeting competition defense in this case is the very real danger that

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[59] See Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 Harv. L. Rev. 913, 928-29 (1952).

the service station operator will not survive as a proprietor. One way or another he is bound to be eliminated from the competitive scene—either by becoming an agent or employee, or by going out of business entirely.

4. *The suggested raising of dealer profit margins.*—The real solution to the dealers' price war woes, according to the Commission, is for the oil companies to increase their dealers' profit margins. If that is done, the argument runs, dealers will have the "financial resources with which to withstand severe temporary competitive pressure" (Br. 39-40).

How an oil company can guarantee its dealers a specific margin of profit without fixing their resale prices, the Commission does not explain. And, in the absence of a price-fixing agreement, any talk of a higher dealer margin ignores the law of supply and demand. Why, after all, did McLean make only a 4.8¢ profit under normal conditions? Sun did not set his resale price. The force of competition from other dealers was what kept McLean from selling at a higher price and therefore increasing his margin.

Suppose that there had never been a price-war. Suppose, further, that Sun (consonant with the Commission's suggestion) had reduced its tank wagon price to all of its dealers, including McLean. Is there any reason to believe that McLean and the other Sun dealers would nevertheless have maintained their retail prices at the same level? Is it not reasonable to assume that certain dealers would have passed along to their customers the saving in gasoline cost in order to build up their volume at the expense of competitors? Thus in the *Standard Oil* case, after Standard had reduced its prices to its jobbers, the latter "reflected, in varying degrees, . . . [these] reductions in the cost of the gasoline to them by reducing their resale prices of that gasoline below the prevailing rates" (340 U. S. at 235). Thus, the cycle begins again; the price war is on.

There is another unrealistic aspect of the Commission's amorphous scheme to give independent retailers the "financial resources with which to withstand severe temporary competitive pressure" (Br. 39-40). Even if McLean had been operating at a higher margin, how could he alone have withstood the competitive blows of a 65-station chain? Is it not perfectly apparent that such chains will always have the power to pick off their small retail competitors one by one?

The conclusion is irresistible that the means suggested by the Commission for improving the lot of the average service station dealer are as unworkable as they are unlawful.

Judge Wisdom's scholarly opinion for the unanimous court below was plainly animated by a desire to safeguard the small businessman and to promote the cause of competition. The Commission's present construction of the Section 2(b) defense frustrates both of these major antitrust goals.

Conclusion.

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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October 1962.

APPENDIX.

Babcock-Cresente Letter.

Federal Trade Commission,
Washington, D. C., June 8, 1954.

Re BAM 3591.

Mr. James V. Cresente,
President, Cleveland Independent Gasoline Dealers Association, Inc.
Cleveland, Ohio

Dear Mr. Cresente:

This will acknowledge receipt of the complaints registered by your association with regard to the pricing practices followed in the Cleveland area by the Pure Oil Products Co., Shell Oil Co., Sinclair Refining Co., Gulf Refining Co., the Broadway Petroleum Corp., The Texas Co., and the Standard Oil Co. (Ohio).

From an examination of these various complaints it appears that the oil companies in question are discriminating in price between their respective dealers by granting temporary competitive allowances of from 0.5 to 0.7 cents per gallon on the condition that such dealers will reduce the retail price of gasoline to a specified figure.

In considering your request for an expeditious investigation of this matter, it should first be stated that the Commission has received, and continues to receive, numerous complaints alleging violation of the Robinson-Patman Act on the part of major oil companies in all sections of the country. In practically all of those instances in which investigations have been conducted, it has been established that the complained of discriminatory pricing practices were being followed in connection with local gasoline price wars which were the outgrowth of efforts by the major oil companies to meet the competition of dealers selling nonbranded gasoline at reduced prices. Under such circumstances, no

corrective action has been taken by the Commission because of the defense available to the sellers under section 2 (b) of the Robinson-Patman Act which provides, in substance, that a seller may defend himself against a charge of unlawful discrimination in price by showing that his lower price was granted in good faith for the purpose of meeting an equally low price of a competitor.

In *Standard Oil Company* v. *Federal Trade Commission* (340 U. S. 231) the Supreme Court declared that section 2 (b) provides a substantive defense to a charge of unlawful price discrimination regardless of the fact that competitive injury is sustained by customers to whom the lower price is not made available. In passing upon this point the Court stated in part as follows:

"In a case where a seller sustains the burden of proof placed upon it to establish its defense under section 2 (b), we find no reason to destroy that defense indirectly, merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, in a natural course of events, reduce their own resale prices to their customers. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. * * * We may, therefore, conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor."

In the light of this construction of the statute, it follows that a seller is within his legal rights in confining his price reductions to dealers in the vicinity of the dealer or dealers whose competition he seeks to meet, even though such action results in injury to customers to whom similar reductions are not made available.

On the basis of the facts set forth in your letters, it does not appear that the situation prevailing in the Cleveland area at the present time differs materially from other situa-

tions in which investigations have been conducted and in which it was determined that no corrective action was warranted. In view of this fact, and because of our experience in investigations of numerous matters in which similar charges were made, it is not believed that the Commission, with its limited manpower and financial resources, would be warranted in conducting the requested investigation.

Another factor which has a material bearing upon our conclusion in this regard relates to investigations in the gasoline industry which are presently being conducted by the Department of Justice. These investigations include inquiry concerning the same practices referred to by you, i.e., discriminations in price and use of coercive tactics to fix the retail price of gasoline and, in addition, involve several of the same refiners. It would appear, therefore, that any action by the Commission at this time would represent a departure from the established policy of both the Commission and the Department of Justice to avoid duplication of effort in matters in which both agencies exercise concurrent jurisdiction.

In view of the foregoing, it is not believed that the Commission would be warranted in conducting further action with respect to this matter at the present time.

Very truly yours,

HARRY A. BABCOCK,
Director, Bureau of Investigation.

Appendix.

Babcock-Snow Letters.

Federal Trade Commission,
Bureau of Investigation,
Washington, August 18, 1954.

Mr. William D. Snow,
General Counsel, National Congress of
Petroleum Retailers, Inc.,
Detroit, Mich.

Dear Mr. Snow:

This will acknowledge receipt of your letter of July 15, 1954, in the form of a complaint filed in behalf of the Mississippi Service Station Operators Association, Jackson, Miss., in which you allege that the Texas Co. is discriminating in price by allowing one of its service stations located in Jackson, Miss., a 1-cent-per-gallon discount which is not allowed to other retailers in the same vicinity for the purpose of controlling the retail price at which the gasoline is to be resold.

In considering your request for investigation of this matter it should be first stated that the Commission has received and continues to receive numerous complaints alleging violation of the Robinson-Patman Act on the part of the major oil companies in all sections of the country. Recently investigations have been undertaken in Pennsylvania and New Jersey and in a number of Midwestern and Southern States, including Mississippi. However, the evidence obtained during the course of these investigations failed to provide a proper basis for the Commission to have reason to believe that the statutes administered by it have been violated as a result of the practices of the major oil companies. In practically all instances in which investigations have been conducted it has been established that the complained-of discriminatory pricing practices were being

followed in connection with local gasoline price wars which were the outgrowth of efforts of the major oil companies to meet competition of dealers selling nonbranded gasoline at reduced prices.

Under such circumstances no corrective action has been taken by the Commission because of the defense available to the sellers under section 2 (b) of the Robinson-Patman Act, which provides in substance that a seller may defend himself against a charge of unlawful discrimination in price by showing that his lower price was granted in good faith for the purpose of meeting an equally low price of a competitor.

In *Standard Oil Company* v. *Federal Trade Commission* (340 U. S. 231), the Supreme Court declared that section 2 (b) provides a substantive defense to a charge of unlawful price discrimination, regardless of the fact that competitive injury is sustained by customers to whom the lower price is not made available. In passing upon this point the court stated, in part, as follows:

"In a case where a seller sustains the burden of proof placed upon it to establish its defense under section 2 (b), we find no reason to destroy that defense indirectly, merely because it also appears that the beneficiaries of the seller's price reductions may derive a competitive advantage from them or may, in a natural course of events, reduce their own resale prices to their customers. It must have been obvious to Congress that any price reduction to any dealer may always affect competition at that dealer's level as well as at the dealer's resale level, whether or not the reduction to the dealer is discriminatory. * * * We may, therefore, conclude that Congress meant to permit the natural consequences to follow the seller's action in meeting in good faith a lawful and equally low price of its competitor."

In the light of the meaning of the statute as determined by the Supreme Court it follows that a seller is within his legal rights in confining his price reductions to dealers in the vicinity of the dealer or dealers whose competition he seeks to meet, even though such action results in injury to

customers to whom similar reductions are not made available.

On the basis of the facts set forth in your letter, it would not appear that the situation prevailing in the Jackson, Miss., area at the present time differs materially from other situations in which investigations have been conducted and which it was determined that no corrective action was warranted.

In addition to the foregoing, the Commission is informed through established liaison channels that the Antitrust Division, Department of Justice, is conducting investigations in the gasoline industry which include inquiry concerning the same practices referred to by you, i.e., discrimination in price and the use of coercive tactics to fix the retail price of gasoline.

In view of the foregoing, it appears that further and additional investigation may not be warranted at this time, particularly where such investigation might involve practices on the part of the Texas Co. similar in nature to those indicated by you.

Your interest and cooperation in bringing this matter to the attention of the Commission are appreciated.

Very truly yours,

HARRY A. BABCOCK,
Director, Bureau of Investigation.

Appendix.

FEDERAL TRADE COMMISSION,
BUREAU OF INVESTIGATION,
Washington, November 22, 1954.

MR. WILLIAM D. SNOW,
General Counsel, National Congress of
Petroleum Retailers, Inc.,
Detroit, Mich.

Dear Mr. Snow:

I am in receipt of your letter of November 3, 1954, with further reference to a complaint which you previously filed against the Texas Co., alleging that it is selling gasoline to a filling-station operator, Dixon Service Station, located on North State Street, Jackson, Miss., and to other stations at a price of 1 cent per gallon below the price offered Cross Service Station, also located on North State Street, and to certain other independent filling stations.

The allegations as to the facts set forth in your letter of July 15 as further interpreted by your letter of November 3, together with the stated legal precedents and argument set forth by you, have been given careful study and consideration. As previously stated to you in my letter of August 18, 1954, a number of investigations have been conducted as a result of the receipt of complaints of a substantially similar nature. Full factual information, almost if not identical with that supplied by you, has been presented to the Commission regarding the practices of the major oil companies. Specific instances where investigation has not only disclosed such practices, but the effect of such practices on competition, have been the subject of study and consideration. In no instance has the Commission issued a complaint where it has been shown that a major oil company reduced its price to a filling-station operator for the purpose of enabling such operator to meet a competitive price.

The investigations heretofore conducted have required the use of more than a proportionate share of the available

funds and personnel, and I believe you will agree that the funds and time expended in obtaining evidence and information to be used as a basis for study and consideration of the complex and difficult problem presented demonstrate a sincere desire on the part of the Commission to fully utilize its statutory authority in an effort to eliminate any actionable unfair methods of competition or discriminatory pricing practices in the petroleum industry.

In view of the foregoing circumstances, it would appear inadvisable for the Commission to initiate an additional investigation which it seems may produce facts and circumstances as a basis for action which would not be substantially different from those already considered and upon which no formal action has been taken.

Your interest in bringing this matter to the attention of the Commission is appreciated, and if you feel that the Commission may be of further service to you in this or other matters, you may be assured of its cooperation.

Very truly yours,

HARRY A. BABCOCK,
Director, Bureau of Investigation.

Appendix.

GWYNNE-HUMPHREY LETTER.

FEDERAL TRADE COMMISSION,
Washington, March 9, 1956.

Hon. HUBERT H. HUMPHREY,
Chairman, Subcommittee on Retailing, Distribution, and Fair Trade Practices, Senate Select Committee on Small Business, Washington, D. C.

Dear Mr. Chairman:

At the hearings on February 18, 1956, before the Subcommittee on Retailing, Distribution, and Fair Trade Practices of the Select Committee on Small Business of the Senate you read into the record a portion of the decision filed on October 1, 1955, by the United States District Court for the District of Connecticut in *Enterprise Industries, Inc.* v. *The Texas Company* (par. 68,163, CCH Rep.), the key point in which you were concerned being the statement that "The act does not go so far as to allow discriminatory price cutting to enable a buyer to meet competition, but only to enable the seller to meet a lawful price of the seller's competitor." You then referred to the fact that the Commission has in the past "sent out letters advising, under similar situations, that 'No corrective action has been taken in such cases by the Commission because of the probable defense available to the sellers under Section 2 (b) of the Clayton Act, as amended by the Robinson-Patman Act.'" You then inquired into the Commission's present views upon this point, and after they were stated it was asked that they be incorporated in a letter to you.

The question in issue arose early in March 1955, when a member of the Commission referred to the General Counsel drafts of several letters relating to the closing of investigations of gasoline price wars which were before the Commission for approval. The request for an expression of the views of the General Counsel related to several situations involving the application of section 2 (b) of the

Clayton Act, and included the application of that section to a situation where a seller granted a price discrimination to a buyer for the purpose of enabling the buyer to meet the prices of his competitors. In April 1955 the General Counsel, in response to this request, advised the Commissioner that although the particular point had not been decided in litigation, he was of the view that a discrimination in price granted by a seller to a buyer to enable the latter to meet the prices of his competitors was probably outside the protection of section 2 (b). This view was based principally upon the language of the statute itself and upon the legislative history showing the purposes of the change from the "meeting competition" language of the original section 2 of the Clayton Act to the present language in section 2 (b) of that act.

On May 3, 1955, the Commission approved revised letters consistent with the view expressed by the General Counsel and directed that the memorandum discussing the application of section 2 (b) be reproduced and distributed to appropriate members of the staff. It must be recognized that the views thus expressed and adopted are necessarily speculative and perhaps the final answer must await a decision on this point by the Supreme Court, though it is interesting to observe that in the decision mentioned above the district court reached the same conclusion.

The adoption of this view by the Commission was for staff guidance and administrative purposes, primarily in connection with the scope of staff investigations, and a final determination by the Commission must await decision in specific cases. There it must ultimately be controlled by the facts as they are developed in the specific case and the opinion of the Commission upon the application of the law to the facts of that case, after briefs are filed and oral argument is had.

It is hoped that this affords the information desired.

By direction of the Commission.

JOHN W. GWYNNE, Chairman.

Office-Supreme Court, U.S.
FILED
OCT 15 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 56

FEDERAL TRADE COMMISSION, *Petitioner*

v.

SUN OIL COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 56

FEDERAL TRADE COMMISSION, *Petitioner*

v.

SUN OIL COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Respondent markets a branded gasoline in 21 states through independent dealers. The product competes with other branded gasoline including a private brand marketed by a chain retailer, Super Test Oil Company, at 19th and Pearl Streets, Jacksonville Florida. At that company operated station, its only Jacksonville

outlet among some 65 company operated stations, Super Test, over a period of months, cut prices and took custom from a Sunoco station at that intersection to such an extent that the Sunoco dealer threatened to go out of business unless he received price assistance. Respondent temporarily reduced its wholesale price to that one dealer, but not to its other dealers in Jacksonville, in order to meet the price raid on its own and its dealer's sales of gasoline. The question presented is whether respondent's temporary price reduction to the one dealer, made in self defense to protect their mutual business from a price raid, constituted a meeting of a competitor's lower price within the meaning of the "meeting competition" proviso of Section 2(b) of the amended Clayton Act.[1]

STATUTE INVOLVED

The pertinent provisions of the statute are set forth in the appendix, *infra*, pp. 50-1.

STATEMENT

Respondent refines gasoline and markets it in a large part of the United States. At the time of the events which present the issues before the Court, respondent marketed a single grade of gasoline, colored blue, and designated "Sunoco" (R. 352). In 1955 Gilbert McLean, one of Sun's thirty-eight retailer-dealers in

[1] As set forth in the brief for the Federal Trade Commission (Brief, p. 2), the Question Presented assumes that only the retailer customer of a supplier competes with other retail sellers for the business of motorists. Central to the question before the Court is the effect to be given to the competition between refiners and other marketers of branded gasoline, through service stations selling a single brand, for the business of the motoring public with whom they maintain continuous communication.

Jacksonville, Florida, operated a service station on the corner of 19th and Pearl Streets in Jacksonville. McLean leased his station from respondent. (R. 15). As the court below found, he was an independent contractor but, like virtually all gasoline dealers, he sold only the branded product of one supplier (R. 352). He bought gasoline from Sun Oil Company at 24.1 cents a gallon and sold it at 28.9 cents a gallon, then the competitive price in the Jacksonville area for comparable gasolines. Late in June 1955 Super Test Oil Company, a chain retailer of a private brand, opened a station across the street from McLean's station and began selling Super Test "regular" gasoline at 26.9 cents a gallon. The Super Test station was one of approximately sixty-five gasoline stations operated by Super Test Oil Company by station managers (R. 319). In August 1955 this single Super Test station in this area commenced a series of price cuts. Some of these price cuts were advertised in the local newspaper and all were advertised on curb signs (R. 353). On August 27 Super Test dropped its posted price to 21.9 cents a gallon and on August 28 dropped its price to 20.9 cents a gallon. Whenever Super Test cut its prices, McLean's sales of Sunoco gasoline declined substantially. As the court below states, Super Test, on a number of occasions, after reducing prices and gaining customers at McLean's expense, raised its price and reestablished the pre-existing two-cent price differential which had existed between its gasoline and Sunoco. On at least one occasion Super Test maintained its low price for a week (R. 353-4). In addition to its cut price Super Test gave trading stamps, which respondent's vice-president testified were evaluated at about one cent a gallon of gasoline (R. 281).

December 27, 1955, Sun gave a discount to McLean of 1.7 cents a gallon. Sun reached this decision, the court below found, after a study of gallonage records of its Jacksonville dealers and of a report from its regional manager, familiar with the local situation. This study led respondent to conclude that only McLean was affected adversely by Super Test's price-cuts, and that a price allowance could be made to McLean to put Sunoco on a competitive level with Super Test at 19th

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that he can do it and still make 3½ cents a gallon, no matter what the amount involved is?

The Witness: That would be the result of our policy.

Hearing Examiner Piper: And you would not turn him down?

The Witness: We might counsel with him and suggest that it was not necessary for him to go down there to meet that lower price and suggest that he try a higher price, but if he elected to go to the lower price we would give him 3½ cents.

Hearing Examiner Piper: Under certain conditions that might result in your selling him gasoline at a loss?

The Witness: Possibly for a time.

Hearing Examiner Piper: But still you would give him the allowance?

The Witness: Yes, Sir." (R. 284).

"Hearing Examiner Piper: That seems like a peculiar situation, if you have no control over the price the dealers post, and you have said it repeatedly, and yet you have a policy under which you in effect guarantee them a 3½ cent margin to operate on. Then they could pick out an artificially low price and because of your policy you have to follow them down and give them an allowance so that they would still have a 3½ cent margin of profit. That does not make sense.

The Witness: Mr. Piper, if I gave that impression then I was incorrect. If they pick an artificially low price we wouldn't recognize such a price and we would not put our policy into effect, but if it is what we consider legitimate actual competition, then we would put our dealers in position to meet that competition if they elected to do so." (R. 285).

to Sun from time to time that
ld be done to meet the Super Test
be forced out of business (R. 356).
ned the situation, but for four
assistance to McLean (R. 356).
mber, Super Test again dropped
Pearl Streets to 21.9 (R. 356).
ut its price up to 26.9. McLean's
d to be 28.9, the court below found
a short lull Super Test dropped
cLean told respondent's regional
he received some help from Sun
business (R. 356). He said he
e of 25.9 to meet the Super Test
olicy in price war situations wa-
electing to post a particular price,
argin of 3½ cents a gallon.[2] On

[2] Commission this price war policy is mis-
aste operating policy to squeeze dealers
rgin. See Brief, pp. 35, 40. There is no
l for this assertion. The testimony of
t, when read in its entire context on this
t *in price wars* Sun endeavored to ensure
ot less than a 3½ cent margin. Thus:

ized on 1.7 to give him 3.5?
ork that way. We had a rule at that
n margin we felt our dealers could exist
when a dealer comes to us and says, 'I
price to meet competition because I am
usiness,' then we figure from his posted
ideration our tankwagon price, what the
must be, or would have to be to afford
that margin of 3½ cents." (R. 278).

Piper: Do you want me to understand
decide to meet competition, no matter
petitive price, and that once he makes
l give him enough of an allowance so

and Peal Streets without adversely affecting any other Sun dealer in Jacksonville (R. 357).

Upon receiving the allowance of 1.7 cents a gallon McLean cut his price 3 cents to 25.9 cents, thereby absorbing 1.3 cents of the cut and reducing his normal gross profit from 4.8 cents to 3.5 cents.

The next day or one day thereafter, Super Test reduced its price to 23.9 cents. McLean maintained his price at 25.9 cents and kept it there until he went out of business (R. 356-7). This occurred on February 18, 1956, two days after a general price war broke out in Jacksonville.

The brief for the Commission states that this price war "followed" Sun's "discriminatory price cut" to McLean (Brief, p. 38). Elsewhere the brief suggests that the local price war at 19th and Pearl Streets "spread" on February 16 (Brief, p. 48). Hence we think it necessary to point out that the record does not show causal connection between the price assistance to McLean and the general price war of February 1956. Indeed, the court below pointed out that Super Test triggered the price war: "February 16 Super Test lowered its price to 22.9 cents for its regular gasoline and 25.9 cents for ethyl. Then, after several major suppliers reduced their tank-wagon price, Sun dropped its tank-wagon price to all of its dealers in the area" (R. 357).

The complaint in this case was filed on September 26, 1956, in two counts, the first charging price discrimination in alleged violation of the Clayton Act, and the second count charging a price fixing agreement with McLean in alleged violation of Section 5 of the Federal Trade Commission Act (R. 2). Respondent's answer in part asserted that, in giving a lower price to

the one dealer, Sun was meeting its competition and also enabling McLean to meet his competition, all of which was justified by the meeting competition proviso of Section 2(b) of the Robinson-Patman Act (R. 7). The hearing examiner found respondent to have committed both offenses (R. 12); the Commission adopted the Examiner's findings and conclusions and a broad order, embracing the marketing of all of respondent's products, including such diverse commodities as crude oil, petro-chemicals and automobile supplies, at all levels of distribution (R. 34). In reversing and setting aside the order on both counts, the court below found it unnecessary to consider the claim that the order was too broad.

The petition for certiorari did not seek review of the holding of the court below as to the price fixing count. The uncontested holding of the court below that the respondent and McLean did not enter into a price-fixing agreement is one of the operative facts in the consideration of the issue before this Court.

The Commission held that "the discount given by [Sun] to McLean was not made to meet a lower price made to the latter by another supplier"; that "it was given to enable McLean to meet the competition of the Super-Test station across the street"; that the proviso "has reference to the good faith meeting of competition of the seller, rather than that of the buyer" (R. 38).[3]

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[3] In this Court the Commission takes the flat position that "the defense is available only to a seller who seeks to meet a price that has *actually been offered to a buyer* by a competitor of the seller" (Brief, p. 20; emphasis added)—a view that goes far beyond the claim that a seller can only meet competition at his own level. This extreme view, interestingly enough, is not shared by the hearing examiner who decided this case below. See the brief amicus curiae of National Oil Jobbers Council, Inc., Point II.

The Commission went on to instruct respondent that it might avoid unlawful price discrimination if it reduced its wholesale price to "all" dealers, or abandoned sales to dealers and substituted company operation of service stations.

The court of appeals held that the proviso to Section 2(b), like Section 2 generally, lacked plain meaning and required interpretation, and that the decisions of this Court supported that conclusion. In appraising the divergent interpretations made possible by the language of the proviso, the court below resorted to the basic aims of the antitrust laws, and found that they would be frustrated by the Commission's narrow interpretation. The court below recognized that the economic realities in the marketing of gasoline to the motoring public brought it about that suppliers of branded products compete with each other for the motorists' business; that suppliers like respondent, who market branded gasoline through dealers, were dependent on the preservation of those dealers as outlets or channels of competition; that such a supplier could be as effectively deprived of a dealer by price raids which would drive him out of business and take over his customers, as by offering him a lower wholesale price; and that to give price assistance to a dealer whose sales of respondent's branded product were depleted by a price raid by a competing chain retailer, was to preserve market competition and tend to further the basic aims of the antitrust laws.

For these reasons the court below found that the narrow interpretation by the Commission of the words of the proviso was not consistent with the discernible intent of Congress.

SUMMARY OF ARGUMENT

The interpretation of the proviso and its application to this case by the court below are based on a number of conclusions by that court which rest on undisputed evidence as to the nature of competition in the marketing of gasoline. Competition for the gasoline business of motorists who buy their gasoline from service stations is primarily a competition among the respective products of the suppliers. Gasoline flows from the supplier to the motorist's tank unchanged by the retailer, who serves with the supplier as a channel of supply, competing with similar channels or units of competing suppliers and dealers.

Respondent and its Sunoco gasoline competed with other branded gasolines in Jacksonville, and, at 19th and Pearl Streets, with Super Test, for the custom of the motoring public.

I

By force of the competitive and economic realities, the equally low price in this marketing context was the price which had been previously posted by Super Test. The "lower price" within the meaning of the proviso was the price Sun had to give its dealer McLean to enable him to post the price for Sun's product which he deemed necessary to meet Super Test's price. In the light of this Court's decisions interpreting the Clayton Act and the broad aim of the antitrust laws, the purpose of Congress can be fulfilled only if protection of the proviso embraces these prices.

The Commission's argument in effect concedes that if Super Test had offered to sell gasoline to McLean at 1.7¢ a gallon less than he was paying Sun, the latter could have discriminated against other Sun dealers in

Jacksonville and met that offer by a price reduction to McLean. If this had happened, the other Sun dealers would have been injured just as much or as little as the record shows. But if, without such an offer, Super Test sets out to take McLean's customers for Sun's product by destroying McLean through deep price cuts, the Commission would deprive Sun of a right to provide the same measure and extent of price assistance. In the first case McLean is preserved as an independent businessman through price assistance by respondent, and, we will assume, other Sun dealers in Jacksonville sustain an injury. In the second case McLean is destroyed, and market competition is *pro tanto* eliminated, because the respondent is not free to give him the same amount of assistance. Such a result is not dictated by legislative history, by the decisions of this Court, or by the basic aims of the antitrust laws.

The Commission's interpretation of the proviso would have it apply only where Super Test made an offer to McLean. But in this industry such offers are not made. Suppliers compete for the business of motorists through retail outlets, and not by offering lower prices to a dealer handling another brand of gasoline. The Commission's argument is in essence that the proviso in Section 2(b) was not intended to apply to this kind of marketing and this kind of competition. But nothing in the statute conditions the availability of the proviso on an offer by a marketer like Super Test to a dealer like McLean. In the *Standard Oil* case this Court, in describing the core of the defense, carefully stated that "wherever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231, 242.

The language of the statute is in terms of meeting an equally low price, not of meeting an offer.

The solutions offered by the Commission where the price cuts of a Super Test threaten to destroy a supplier's dealer outlet, are to "meet such competition at the dealer level by non-discriminatory reductions in price to all dealers, or by operating its own stations. * * *" (R. 24, 38). These suggestions would defeat the aims of the statute and, indeed, of the antitrust laws generally.

McLean needed help against the price cutting of a more powerful competitor, the Super Test chain, which, operating its own stations, "could fix any retail price it pleased," as the court below found, while McLean's price depended on Sun's price to him (R. 355). McLean could get help from Sun and only from Sun. If, however, Sun must reduce its price to all dealers to be able to help McLean without violation of the Clayton Act, then Sun must lower its price for thousands or millions of gallons of gasoline sold through other dealers, in order to save the income it might derive from sustaining McLean's ability to sell an infinitely smaller volume of gasoline. Respondent failed in its effort to save McLean, by not helping him soon enough, but if it could not make such an effort unless it gave a general price reduction to all dealers, then the selective destruction of the McLean is made easy, for a general price reduction could not be justified as prudent business judgment.

The court below concluded that if Sun reduced its price either to all dealers in Jacksonville, or to all of its dealers in the United States, other oil companies, majors and non-majors, would have to meet Sun's price

cuts, thereby spreading price wars and subjecting the margins of filling station operators to further compression. A price war may or may not result from individual assistance to a single dealer. The Commission's view ensures one and the harm it works on independent dealers.

Nor are these the only defects in the suggestion made in the Commission's decision that Sun meet its competition at 19th and Pearl Streets by lowering its price to "all" dealers. No matter where a line is drawn the Commission can be expected to point to a dealer across the street, or down the road, or in an adjoining town, as being discriminated against contrary to Section 2(a). If, in such circumstances, a seller must give to "all" its dealers a general uniform price cut, there is no geographic limit less than its entire market area which can be delimited with assurance. For wherever it drew the line, Sun would not have available to it the meeting competition defense of the Section 2(b) proviso because, under the Commission's view, Sun would still be meeting only McLean's competition and not its own; accordingly, without the benefit of the proviso, a supplier must reduce its prices to all of its dealers, everywhere, to be free from the thrust of Section 2(a).

A price response wider than the exigencies of the individual competitive situation but narrower than the entire market area served by a supplier may refute the good faith of the price reduction and thereby deny the defense granted by Section 2(b). The proviso places emphasis "on individual competitive situations rather than upon a general system of competition." *E. Edelmann & Co.*, 51 F.T.C. 978, 1006-1007 (1955). The record shows that in December 1955 only McLean appeared to be affected by Super Test's pricing, and there

is no suggestion whatsoever that Sun did not in good faith limit the geographical area in which it lowered its price (R. 54, 100, 130-1, 151, 188, 224, 357).

The other solution of the Commission to the task of interpreting the proviso in the context of this case is to conclude that Congress preferred company operation of service stations rather than an effort like respondent's to preserve a small businessman. The court below pointed out that "the natural effect of the Commission's holding will be to push already highly-integrated majors into combining direct retailing with their other operations—*to the detriment of non-majors, such as Super Test, as well as to the detriment of filling station operators*" (R. 373). The elimination of the independent gasoline dealer from the American scene was not the purpose of Congress in its selection of language for the proviso in Section 2(b).

The broad policy of the antitrust laws is furthered by the decision of the court below. In construing this statute in *Standard Oil*, this Court identified competition to be a primary interest of the antitrust laws as a whole; and the Court described the "defense in subsection (b)" of the Robinson-Patman Act as one restricted to "price differentials in *actual competition*." 340 U.S. at 241-2 (Emphasis supplied). The Court concluded: "*Actual competition*, at least in this elemental form, is thus preserved." 340 U.S. at 242 (Emphasis supplied). Thus, this Court saw in the statute a purpose to preserve the fabric of competition, and not the narrow purpose which the Commission derives from a narrow interpretation of "competitor." When to this interpretation there is added this Court's statement in *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, that "considerations of fairness * * * must, we think, have been controlling in the draft-

ing of Section 2(b) * * *,", and this Court's conclusion in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 49, that "* * * in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities. * * *," then it is not difficult to conclude that the 2(b) proviso can fulfill these purposes only if it is possible for the McLeans to receive defensive help from their suppliers when attacked by a more powerful chain retailer.

II

The petitioner's brief treats the issue as one which requires solution of such problems as the liquidation of an alleged "oligopolistic" industrial structure, and finding measures to render harmless an alleged imbalance of relative economic power between suppliers and dealers. But the case made by the record involves only the respondent and a meeting of competition at 19th and Pearl Streets, Jacksonville. The respondent's position is that the proviso was properly interpreted by the court below for this case. Not only is the oil industry not party to this case, but the Commission's attempt at blanket condemnation flouts Section 2(b)'s focus on "individual competitive situations."

The Commission's alternatives to the decision of the court below are grounded upon the mistaken notion that only by these means is it possible to prevent or immunize predatory price cuts (Brief, p. 41 *et seq.*) To this there are two answers. (1) It was not Sun which first cut prices, it was Super Test, and the price cutting was plainly aggressive. The implication of petitioner's brief is that the interpretation of the proviso by the court below enables "big" Sun to act in a predatory

way upon "little" Super Test. But when we note how the need to invoke the proviso arose, the posture of affairs is not "big" Sun versus "little" Super Test, but "big" chain retailer Super Test versus "small" businessman McLean. The proviso, as construed by the court below, permits only defensive action by a supplier in aid of its retailer. If a supplier should in any way go beyond this, it would not have the benefit of the defense. (2) In any event, if the presence of predatory pricing is demonstrable, the law and law enforcement agencies are available to put it down. An artificial, narrow, reality-ignoring construction of the proviso is not necessary.

The construction of the proviso by the court below requires the Commission to look to the substance of Robinson-Patman Act prosecutions; the Commission would look only to surfaces and form. The application of the proviso to the facts of this case encounters competitive and economic realities in the marketing of gasoline. The court below gave effect to them, the Commission ignored them. The result of the decision of the court of appeals is not to create a right to inflict competitive injury; it carries out the purpose of Congress to protect the institution of competition by permitting a supplier to protect itself and its outlet from a price raid. Finally, the decision of the court below makes it possible for small businessmen, singularly dependent on a source of supply, to be preserved as independent enterprisers instead of being eliminated by the integration of supply and distribution functions in their respective suppliers.

Price wars in the oil industry are complex economic phenomena which are not amenable to facile generalization or easy solution. The court of appeals upheld

Sun's temporary price reduction to McLean in the context of the facts of *this case*. It is *this* holding, not the industry-wide conjectures advanced by the Commission's brief, which is the issue before this Court.

ARGUMENT

I

As Construed by the Court Below the Proviso Carries Out the Discernible Legislative Purpose in Harmony With This Court's Interpretation of Section 2 of the Clayton Act and With the Broad Policy of the Antitrust Laws.

1. The interpretation of the proviso and its application to this case by the court below are based on a number of conclusions by that court which are the premise of the respondent's argument. Those conclusions in part rest on undisputed evidence as to the nature of competition in the marketing of gasoline.

Competition for the gasoline business of motorists who buy their gasoline from service stations is primarily a competition among the respective products of the suppliers (R. 370-373). The economic functions performed by each supplier through its dealers bring this about. Thus suppliers of gasoline must maintain the bulk of the stocks needed to insure an ever-available supply to the motoring public through the limited storage facilities of dealers. The supplier is responsible for building and sustaining consumer acceptance of the branded product by which the dealer seeks the custom of motorists. Competing suppliers are in continuous communication with motorists through many advertising media.[4] The supplier makes the product

[4] Respondent's budget for gasoline advertising directed at the motorist in 1957 was 6 million dollars, or 1/3 of a cent per gallon (R. 211).

available over broad geographic areas, to meet the needs of the motorist's mobility. Gasoline flows from the supplier to the motorist's tank unchanged by the retailer, who serves with the supplier as a channel of supply, competing with similar channels or units of competing suppliers and dealers (R. 213).[5] As a result, respondent and its Sunoco gasoline competed with other branded gasolines in Jacksonville, and at 19th and Pearl Streets with Super Test, for the custom of the

[5] Respondent's vice-president testified (R. 214):

Q. Would you please state specifically who were the sellers of gasoline competing for the business of the motoring public passing 19th and Pearl Streets?

A. The Sun Oil Company through its independent dealer, Mr. McLean, and the Super-Test station through its company-operated station.

Q. Was your company competing for that business with the Super-Test chain only, or with the station as a retailer of Super-Test gasoline?

A. We were competing with the station as a retailer of Super-Test gasoline for the business of the motorist residing or working near that location, 19th and Pearl, and who would find it convenient to stop at that station.

Q. Upon what facts do you base your conclusion that Sun was in competition with the individual Super-Test station across from the one operated by McLean for the business of motorists in that immediate neighborhood?

A. Through the fact that our communication had been direct to the motorists through all the media of advertising which I have mentioned; through the fact that we have neat, attractive service stations distinctively marked; we have dealers that are trained and able to render the kind of service the motorist requires, and of prime importance the fact that we have no other Sun station in the vicinity able to serve the motorist's needs.

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at 1.7c a gallon less than he was paying Sun, the latter could have discriminated against other Sun dealers in Jacksonville and met that offer by a price reduction to McLean.[7] If this had happened, the other Sun dealers would have been injured just as much or as little as the record shows.[7] But if without such an offer, Super Test sets out to take McLean's customers for Sun's product by destroying McLean through deep price cuts, the Commission would deprive Sun of a right to provide the same measure and extent of price assistance. In the first case McLean is preserved as an independent businessman through price assistance by respondent, and, we will assume, other Sun dealers in Jacksonville sustain an injury. In the second case McLean is destroyed and market competition is *pro tanto* eliminated, because the respondent is not free to give him the same amount of assistance, even though in retrospect, as the court below found, "it would seem impossible to say whether [other

[7] While the respondent did not seek review in the court below of the Commission's finding of competitive injury based on a purported diversion of gallonage (R. 36-8), since the Commission's brief in this Court contains innuendoes that three of the four Sunoco dealers who testified in support of the Commission's complaint were driven out of business by the price assistance given to McLean by respondent (Brief, pp. 11, 48), we think it appropriate to point out that there is no proof of causal relationship between that assistance to McLean and the decisions of these dealers to discontinue operation of their respective stations. Neither the decision of the hearing examiner (R. 12 *et seq.*) nor the opinion of the Commission (R. 34 *et seq.*) suggests that the price assistance to McLean was responsible in any way for the decision of any of these dealers to discontinue operations. Indeed, neither the Examiner's decision nor the Commission's opinion makes any reference to the fact that the three dealers referred to now in the Commission's brief discontinued operation of their stations

Sunoco dealers] suffered a loss of gallonage from Sun's price allowance to McLean or from Super Test's aggressive price cutting" (R. 366). Such a result is not dictated by legislative history, by the decisions of this Court, or by the basic aims of the antitrust laws. In interpreting the proviso the court below wisely was guided by this Court's observation in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, 753, that the Robinson-Patman Act clearly "places emphasis on individual competitive situations."

In reality a chain retailer's price may constitute competition for both a seller like Sun and its buyer McLean, which both must meet "or lose the business on which both depend for their common survival."[8] Enforcement of the price discrimination provisions of the Robinson-Patman Act by the Commission has proceeded on the conclusion that under some circumstances a seller in reality steps into the shoes of his customer. In such instances the seller can be meeting in good faith an equally low price of a competitor of both itself and its dealer.[9] De Chazeau & Kahn, in *Integration And Competition In The Petroleum Industry* (1959) at p. 480, point out, as quoted in the opinion of the court below (R. 370): "Most of the evidence seems clearly to demonstrate that a company offers discounts because its dealers are losing business

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[8] See Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), p. 254.

[9] The "indirect purchaser" doctrine of the Federal Trade Commission reasons that customers of a supplier's distributors may be viewed as indirect purchasers of the supplier. The development of the Commission's doctrine is traced in Rowe, *op. cit. supra* note 8, at pp. 57-9. See the Commission's opposition to the petition for certiorari in *American News Co.* v. *Federal Trade Commission*, No. 263, October Term, 1962.

to price-cutting competitors; since the major suppliers compete among themselves and with independents primarily *through* their dealers, the concessions are made in a very real sense in good faith to meet competition. Furthermore, there is little evidence—and certainly none so far in these cases [*Enterprise Industries*[10] and the instant case, then before the Commission]—that the discrimination complained of put a halt to price competition, or even threatened to do so."

The Commission's interpretation of the proviso would have it apply only where Super Test made an offer to McLean. But in this industry such offers are not made. Suppliers compete for the business of motorists, through retail outlets. And the independent dealer is, in the words of the court below, "a rare bird among retail merchants. His business is built around pumps which can be used only for his supplier's gasoline. Sun sells Sunoco in pumps that say 'Sunoco.' Its competitor at 19th and Pearl in Jacksonville, Super Test, sells its gas in pumps that say 'Super Test.' Sunoco gasoline flows unchanged from Sun through Sun pumps to motorists. Sun, not some small retailer, bears the primary responsibility for advertising and for puffing Sunoco against Super Test and other gasolines even though the sales which are competitive take place at the consumer level. McLean's losing fight for survival, therefore, was a lost battle in a long war between Sunoco and Super Test, suppliers, each out to increase its share of the motorists' trade" (R. 371).

A single station in the vicinity of 19th and Pearl Streets sufficed for Super Test, and to enlarge its business it did not undertake to offer its gasoline to Mc-

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[10] 136 F. Supp. 420 (D. Conn. 1955).

Lean, but to take away his customers by deep price cuts. This is the nature of competition in this industry. The Commission's argument is in essence that the proviso in Section 2(b) was not intended to apply to this kind of marketing and this kind of competition. But nothing in the statute conditions the availability of the proviso on an offer by a marketer like Super Test to a dealer like McLean. In *Standard Oil Company* v. *Federal Trade Commission* the facts were that years ago an offer had been made to jobbers who had been purchasing Standard Oil Company's product. But it bears repeating, we think, that the Court in that case (340 U.S. 231 at 242), in describing the core of the defense, carefully stated that "wherever a lawful lower *price* of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower *price*." (Emphasis supplied). The language of the statute is in terms of meeting an equally low price, not of meeting an offer.

3. The solutions offered by the Commission where the price cuts of a Super Test threaten to destroy a supplier's dealer outlet, are to "meet such competition at the dealer level by non-discriminatory reductions in price to all dealers, or by operating its own stations. * * *" (R. 24 and 38). But this Court said in *Standard Oil* that the Robinson-Patman Act does not require a seller to choose "between ruinously cutting its price to all customers . . . or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs." *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 250. The Court noted that the seller's price cut would affect competition at the so-called secondary level—the level invoved in this case—and concluded that Congress must have had in mind that inevitably a meeting of compe-

tition would have a multi-level effect. Congress, with this awareness, described a multi-level offense in Section 2(a) and it is reasonable to conclude that it meant the "meeting competition" justification to be co-extensive with the offense.

What the court below preserved by its construction of the statute is not some privilege to discriminate with impunity, but the values for market competition which can be safeguarded by a defensive meeting in good faith of a competitive assault. If one situated as the respondent cannot enjoy the protection of the proviso except by reducing prices to all of its dealers in order to save a McLean from destruction, this would not only have the practical effect of eliminating the protection of the proviso for such marketers,[11] but would defeat important objectives of the antitrust laws and aims of the Commission.

(a) McLean needed help against the price cutting of a more powerful competitor, the Super Test chain, which, operating its own stations, "could fix any retail price it pleased," as the court below found, while McLean's price depended on Sun's price to him (R. 355). McLean could get help from Sun and only from Sun. If, however, Sun must reduce its price to all dealers to be able to help McLean without violation of the Clayton Act, then Sun must lower its price for thousands or millions of gallons of gasoline sold through other dealers, in order to save the income it might derive from sustaining McLean's ability to sell

[11] The court below observed that for an oil company marketing gasoline through filling stations owned or leased by the operators and competing with a supplier-retailer, the practical effect of adopting the Commission's view is to excise from the Act the defense of meeting competition (R. 370).

an infinitely smaller volume of gasoline. Under such circumstances a marketer cannot be expected to provide help to a dealer, and so a small businessman, for whom the Commission's brief repeatedly expresses concern, will be put out of business.

The Commission urges that the purpose of Congress in enacting the Robinson-Patman Act was to "strengthen the protection of small business" and to enhance the ability of enforcement agencies to deal with "localized price-cutting by a large firm for the purpose of driving a smaller firm out of business" (Brief, p. 32). We agree, and point out that "big" Super Test was making deep price cuts to drive "small" businessman McLean out of business. It is not Sun's competitor that is out of business, but Sun's outlet. Respondent failed in its effort to save McLean, by not helping him soon enough, but if it could not make such an effort unless it gave a general price reduction to all dealers, then the selective destruction of the McLeans is made easy, for a general price reduction could not be justified as prudent business judgment, or, as we shall now attempt to show, a step free from the risk of violation of law.

If a marketer confronted by the situation such as pressed upon the respondent must accompany price assistance to a single besieged dealer by a general uniform price cut to all dealers, a general price war, hurtful to independent dealers over a large area, is inevitable. The court below concluded that if Sun reduced its price either to all dealers in Jacksonville, or to all of its dealers in the United States, other oil companies, majors and non-majors, would have to meet Sun's price cuts, thereby spreading price wars and subjecting the margins of filling station operators to

further compression.[12] A price war may or may not result from individual assistance to a single dealer. The Commission's view ensures one and the harm it works on independent dealers, amongst others.

"Nor are these the only defects in the suggestion made in the Commission's decision that Sun meet its competition at 19th and Pearl Streets by lowering its price to all dealers. No matter where a line is drawn the Commission can be expected to point to a dealer across the street, or down the road, or in an adjoining town, as being discriminated against contrary to Section 2(a). If, in such circumstances, a seller must give to "all" its dealers a general uniform price cut, there is no geographic limit less than its entire market area which can be delimited with assurance. For if Sun limited its price reduction to Jacksonville alone, Sun dealers elsewhere in Florida, and in the United States, would be charged higher prices and this would be discriminatory under the Commission's theory. The effect on competition, if any, might be at a different competitive level (see *Anheuser Busch, Inc.* v. *Federal Trade Commission*, 265 F. 2d 677 (C.A. 7, 1959), reversed 363 U.S. 536; *Gerber Products Company* v. *Beech-Nut Life Savers*, 160 F. Supp. 916 (S.D.N.Y. 1958)). Sun would not have available to it the meeting competition defense of the Section 2(b) proviso because, under the Commission's view, Sun would still be meeting only

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[12] In *Enterprise Industries* v. *Texas Co.*, 240 F. 2d 457, 458 (C.A. 2, 1957), Judge Learned Hand pointed out: "It is not uncommon in the industry for a filling station to start what has come to be known as a 'gas war': that is to cut the prevailing price of gasoline, which other competing stations must meet by a corresponding cut in order to keep up their sales, *and that makes it important . . . for the producing companies* to reduce their price to their own competing stations." (Emphasis supplied).

McLean's competition and not its own. Accordingly, without the benefit of the proviso, a supplier must reduce its prices to all of its dealers, everywhere, to be free from the thrust of Section 2(a).

Even to guard against a charge of customer-level price discrimination a seller like respondent could not safely limit the geographic scope of its price reduction to a single community. In *American Oil Company*, Docket No. 8183 (June 27, 1962), the Commission found the respondent, a marketer of gasoline through dealers, to have violated Section 2(a) by giving price assistance in a price war to all of its dealers "in and around" Smyrna, Georgia, but not to its dealers "in and around" the nearby town of Marietta, Georgia. In a dissent Commissioner Elman observed (page 13):

> "If American had chosen to give equally large discounts to its Marietta dealers, where could it have safely stopped? Smyrna and Marietta are located along a major north-south highway with gasoline stations in every town along the way. A price cut to any station or group of stations would be bound to affect the sales of nearby stations up or down the road, and if American made its reductions to all stations on this highway there would undoubtedly be effects upon stations located on adjacent and intersecting roads. Under the Commission's theory American's only safe alternative would be to reduce its prices to all of its dealers everywhere. But is the Commission prepared to say that this enlargement of a local brush fire into a nuclear price war would have effects upon competition less injurious than those of the course of action which American actually pursued?"

This alternative to the construction of the proviso by the court below is not one which Congress could

have intended. Congress was plainly concerned with protecting small business. Big price wars, or the price rigidity resulting from price cuts over vast market areas, are not means of protecting it.

Actually, a price response wider than the exigencies of the individual competitive situation, but narrower than the total marketing area of the seller, may refute the good faith of the price reduction and thereby deny the defense granted by Section 2(b). For the text of the proviso as well as its legislative history disclose that the actions of the price-cutter determine substantially the extent of a permissible competitive response, both in terms of the price itself and in terms of the geographical area in which the price reduction should be made available. In the same way that the actions of Sun's competitor define the permissible range of price reduction on Sun's part, the competitor's actions determine the permissible area for the price reduction. As the Commission itself has heretofore stated, the proviso places emphasis "on individual competitive situations rather than upon a general system of competition." *E. Edelmann & Co.*, 51 F.T.C. 978, 1006-1007 (1955). In short, Sun could respond only to the individual competitive situation facing it, or in the Commission's language, Sun's own price reduction must be "geared" to what the price-cutter did.

Consequently, a price cut in one locality could hardly be used as justification for a corresponding price reduction in a competitive area miles away and apparantly unaffected by the initial price cut. Indeed, the Act's legislative history records that precise example as defining the outer perimeter of a defensive price reduction. Thus, the congressional debates include the following illustration by Congressman Utterback, Chairman of the House Conference Committee:

"To illustrate: The House committee hearings showed a discrimination of 15 cents a box granted by Colgate-Palmolive-Peet Co. on sales of soap to the A. & P. chain. Upon a complaint and hearing before the Federal Trade Commission, this proviso would permit the Colgate Co. to show in rebuttal evidence, if such were the fact, an equally low price made by a local soap manufacturer in Des Moines, Iowa, to A. & P.'s retail outlets in that city; but this would not exonerate it from a discrimination granted to A. & P. everywhere, if otherwise in violation of the bill." 80 Cong. Rec. 9418 (1936).

So here, Super Test did not cut its price in every competitive area in which Sun had a dealer. Instead, Super Test concentrated its price cutting on the single dealer located at 19th and Pearl Streets. Sun could not "in good faith" meet that price by lowering its own prices across the board in areas apparantly in no way affected by what Super Test did. While the good faith part of Section 2(b) obviously permits some margin of error in meeting a price cut by a competitor, it is nonetheless clear that at some point a plainly greater than necessary response would negative the existence of a good faith meeting of competition. The record shows that in December 1955 only McLean appeared to be affected by Super Test's pricing, and there is no suggestion whatsoever that Sun did not in good faith limit the geographical area in which it lowered its price (R. 54, 100, 130-1, 151, 188, 224, 357).

Yet, by reason of a distorted reading of the statute the Commission insists that Sun had to lower its price in a much wider, but undefined, area even though there was no apparant competitive reason for doing so. If the Commission seriously believed that Sun's price reduction was not "geared" to the price-cutting of Super

Test, it never alleged that to be the case nor did the Commission adduce any evidence to support such an allegation.

So long as Sun was able to demonstrate its good faith regarding the area in which it lowered its price, no quibble as to the wisdom or success of that decision can justify a strained interpretation of the statute which would retroactively deny the defense to Sun.

(b) The other solution of the Commission to the task of interpreting the proviso in the context of this case is to conclude that Congress preferred company operation of service stations rather than an effort like respondent's to preserve a small businessman. The court below pointed out that "the natural effect of the Commission's holding will be to push already highly-integrated majors into combining direct retailing with their other operations—*to the detriment of non-majors, such as Super Test, as well as to the detriment of filling station operators*" (R. 373). The elimination of the independent gasoline dealer from the American scene was not the purpose of Congress in its selection of language for the proviso in Section 2(b). But this is the thrust of the Commission's interpretation of the proviso, built upon and going beyond the decision in *Enterprise*.[13] The Robinson-Patman Act was enacted

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[13] "The [*Enterprise*] decision, in addition, erects a barrier to backward shifting of the cost of retail price wars. Both this barrier and the stimulus to vertical integration will injure the small businesses which the Robinson-Patman Act harbors. The good faith defense should be read so as to avoid these incongruous results." Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L.J. 935, 942-948.

See also notes approving the decision of the court below, in 75 Harv. L. Rev. 429 (1961); 1962 Duke L. J. 300; 47 Va. L. Rev. 1229 (1961); 62 Col. L. Rev. 171 (1962).

in a period of apprehension as to the prevailing tendency toward concentration in industry, specifically as to retail chain operation, as represented here by Super Test. Even the petitioner points out (Brief, p. 42) that "Representative Patman, in the course of explaining why it was necessary to limit the very proviso at issue in this case, said 'One of the objects of the bill is to * * * prevent the large corporate chains from selling below cost in certain localities, thus destroying the independent merchants, and making it up at other places where their competitors have already been destroyed' (80 Cong. Rec. 8235)." It was stated in the House that "there is no question but that the sentiment of the country favors the retention wherever possible of the independent merchant and local ownership, and the enactment of this legislation will go far as Congress can in a legitimate effort to bring this about." 80 Cong. Rec. 10745. Congressman Patman stated that the bill was "designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves and the manufacturer from whom he buys, from exploitation by his chain competitor." 79 Cong. Rec. 9078. See also Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* (rev. ed. 1953, American Law Institute) pp. 6-11 and H. Rep. No. 2287, 74th Cong., 2d Sess., pp. 7-8.

This case involves the protection of a small independent merchant, McLean, from the aggressive price raid of the Super Test chain. By directly encouraging the elimination of the independent gasoline retailer, the position of the Commission is in direct conflict with the very purposes for which the Robinson-Patman Act was enacted. *Cf.* Mr. Justice Douglas' dissent in *Standard Oil Company of California* v. *United States*, 337 U.S.

293, 319-321; see also Mr. Justice Jackson's statements, concurred in by Mr. Justice Burton and Mr. Chief Justice Vinson, 337 U.S. at 323-324.[14]

No such perverse results flow from the construction of the proviso by the court below. That construction serves to strengthen the independent gasoline dealer in competing with other dealers and with large chains of

[14] The petitioner's brief comments, by reference, to a 1959 federal district court decision, that respondent at one time engaged in direct service station operation and shifted to dealer operation because of the enactment of chain store tax and social security legislation. Assuming that those comments may be judicially noticed as relevant facts here, they do not establish that a resumption of company operation is unthinkable. The need to reduce prices everywhere to save dealers from selective, progressive destruction might well prove to be an economic influence far outweighing the factors which the Commission asserts would deter such action. As noted above, four justices of this Court have not considered a return to company operation in this industry to be unthinkable.

Mr. Justice Douglas in his dissent in *Standard Oil Company* v. *United States*, 337 U. S. at p. 320, forecast that a narrow construction of Section 3 of the Clayton Act sets the stage for oil companies, as one alternative course of action, to turn to "the use of the 'agency' device, which in practical effect means control of filling stations by the oil companies * * *". The use of agency is growing. Two Federal Trade Commission proceedings attacking its use are pending. *Atlantic Refining Co.*, Docket No. 7471; *Sun Oil Company*, Docket No. 6934. In the last cited prosecution the hearing examiner's finding that this respondent violated the Federal Trade Commission Act by offering and then entering into agency contracts with all of its dealers in the Norfolk, Virginia, market area to meet price war conditions, is based on a record which includes evidence that respondent assisted all dealers in the area in this manner because respondent's assistance to McLean alone had been, a few weeks before, attacked by the Commission's complaint in this case. See also *Simpson* v. *Union Oil Co. of California*, 1961 Trade Cases, par. 69,936 (N.D. Cal. 1960). Contrary to the implication of the Commission's argument here, there is evidence that oil companies are willing to assume the responsibilities and larger costs of retail selling.

stations. It provides a legal de-
nomic defense. Because it is so con-
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uishing between the two.[15]

court below preserves values which *Enter-*
s Co., 136 F. Supp. 420 (D. Conn. 1955),
mission (Brief, pp. 15 and 28) as expressing
ot take into account. Moreover, "by nar-
ion 2(b), the decision [*Enterprise*] aggra-
wars on retailers who are forced to cut
their volume of sales * * * [such a deci-
prohibit suppliers from lowering their
their retailers meet a competitor's price
prevent retail prices from being driven as
occur, the full amount of these price cuts
the dealer's profit margin. And since the
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price-cutting * * * [such a decision] may
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35, 941-942.

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6 (C.A. 9, 1955), cert. den. 350 U. S. 991,
of the proviso by the court below, and not
ion. See to the same effect *American Co-*
tion v. *Anchor Serum Co.*, 153 F. 2d 907
n. 229 U. S. 721 (Seller has right to be
its wholesale price to its retailers so that
the lower resale prices of their retail com-
her Products Company v. *Beech-Nut Life*
(S.D.N.Y. 1958).

4. The broad policy of the antitrust laws is furthered by the decision of the court below. Since the legislative history of the proviso is of little help in ascertaining who Congress thought to be competitors, the policy of the antitrust laws, to which Congress appended the Robinson-Patman Act, increases in importance as an aid to interpretation. The basic aims of the antitrust laws are particularly illuminating when, as here the problem is "not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind if the point had been present." Gray, *Nature and Sources of the Law*, p. 173 (2d ed., 1927).

The Commission's brief (at pp. 31-32) asserts that economic and policy considerations should not be resorted to for the purpose of construing the Robinson-Patman Act, despite this Court's treatment of the Act as one requiring such resort in *Standard Oil v. Federal Trade Commission*, 340 U.S. 231. The Commission's brief then proceeds to make the remarkable argument that the external policy considerations to be regarded are that Section 2 "may fairly be viewed as incorporating a congressional policy similar to that of the social security, wage-and-hour, collective bargaining and other social legislation whose primary effects Sun and the other major oil companies have sought to avoid by withdrawing from direct retail operations * * *" (Brief, p. 32, note 19). How it would have promoted the small business aims of the Robinson-Patman Act if Sun had not withdrawn from direct retail operations is not explained, and we suggest that it would not further those aims for Sun and other oil companies to now withdraw from marketing through independent dealers.

When it turns its attention to the broad policy of our antitrust legislation the Commission's argument overlooks the fact that this Court identified "the heart" of our national economy policy in passing upon this very statute in *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231, 248:

> "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition which it sought to protect, and monopoly, which it sought to prevent.' *A. E. Staley Mfg. Co.* v. *Federal Trade Commission* (C.A. 7th) 135 F. 2d 453, 455."

The narrow meaning which the Commission would give to the word "competitors" in the proviso to Section 2(b) disregards this Court's emphasis on competition. Not only did this Court identify competition to be a primary interest of the antitrust laws as a whole; this Court also described the "defense in subsection (b)" of the Robinson-Patman Act as one restricted to "price differentials in *actual competition*." 340 U.S. at 241-2 (Emphasis supplied). The Court proceeded to describe the core of the defense, as quoted *supra*, p. 18, and concluded: "*Actual competition*, at least in this elemental form, is thus preserved." 340 U.S. at 242 (emphasis supplied). Thus this Court saw in the statute a purpose to preserve the fabric of competition, and not the narrow purpose which the Commission derives from a narrow interpretation of "competitor."

When to this interpretation of the Robinson-Patman Act in *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231, there is added this Court's

statement in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, that "considerations of fairness * * * must, we think, have been controlling in the drafting of Section 2(b) * * *," and this Court's conclusion in *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 49, that "* * * in enacting the Robinson-Patman Act Congress was especially concerned with protecting small businesses which were unable to buy in quantities. * * *",[16] then it is not difficult to conclude that the 2(b) proviso can fulfill these purposes only if it is possible for the McLeans to receive defensive help from their suppliers when attacked by a more powerful chain retailer.

5. The primary reliance of the petitioner, in attempted avoidance of the force of the foregoing considerations, is that the proviso has a plain meaning, and that the plain words of the statute, taken in their normal and customary meaning, make the defense set up by the 2(b) proviso available only to a seller who "seeks to meet a price that has actually been offered to a buyer by a competitor of the seller * * *." (Brief, p. 20 *et seq.*) The court below concluded that the language of Section 2(b) was imprecise enough to support divergent interpretations as to the meaning of the proviso.[17]

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[16] A gasoline dealer cannot accumulate an inventory of gasoline when prices are low, for the tanks of a service station are limited capacity (R. 371). A chain retailer like Super Test can take advantage of quantity buying and its price advantages.

[17] The Commission argued in the court below that "the plain wording of the proviso * * * has reference to the good faith meeting of competition of the seller * * *"; respondent claimed that it came "within the scope" of the proviso in that Super Test was a "competitor" of respondent (R. 369).

The proviso in Section 2(b) is part of a statute which this Court has said is not noted for "precision of expression," and Section 2(b) itself has been described by this Court as being couched in "infelicitous language."[18] For want of plain meaning the Court found it necessary to search out and give expression to the meaning of the proviso in *Standard Oil Company* v. *Federal Trade Commission*, 340 U.S. 231. There the Court, among other sources, looked to "widespread understanding" that the proviso sets out "a complete defense," 340 U.S. at p. 246, and the Court referred to the reflection of that understanding in actions and statements by members and counsel of the Federal Trade Commission.[19] The Court extended

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[18] *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 65. Mr. Justice Jackson, dissenting in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 482, 494, said of the price discrimination law that it was "complicated and vague in itself and even more so in its context. Indeed the Court of Appeals seems to have thought it almost beyond understanding."

Section 2 as a whole is marked by ambiguities and inadvertent gaps which have resulted in interpretations of a far reaching nature. For example, in *United States* v. *Borden Co.*, 370 U.S. 460, 468, the Court noted that the cost justification defense was "literally susceptible" of one construction, but adopted another construction more consonant with the legislative purpose. In *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92, 96 (C.A. 2, 1962), the court observed that the omission of "buyers" from the literal terms of Section 2(d) was more " 'inadvertent' than 'studious' ". See also *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365, 369 (C.A. 2, 1958) ("of like grade and quality" inserted in Section 2(d)); *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132, 133, 134 (C.A. 2, 1946), cert. denied, 331 U.S. 806 ("engaged in commerce" inserted in Section 2(e) and "purchasers" in Section 2(d) modified by "competing").

[19] Even as the position of the Commission in *Standard Oil Company* v. *Federal Trade Commission* was a departure from "a widespread understanding * * * reflected in actions and statements of members and counsel of the Federal Trade Commission" (340 U.S.

its earlier consideration of the legislative history of the proviso, made in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746, and concluded (340 U.S. at 247, note 14) that "we find that the legislative history, at best, is inconclusive." It is equally inconclusive on the precise question before the Court in the present case.[20] Here, as was true in *Standard Oil*, there is need to "reconcile" with "broader anti-trust policies" language marked by indeterminate generalities. *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 73, 78.

The words of this statute hardly have, as the Commission's brief claims (p. 21), a "normal and customary meaning." *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 388. Otherwise this Court would not

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at 246), so also the complaint of the Commission in the present case and the Commission's position taken in this Court depart from a policy of the Commission that price allowances such as Sun made to McLean enjoy the benefit of the proviso to Section 2(b). The court below noted that the Commission "has changed sides on the issues." (R. 379). The price assistance to McLean was given when the Commission's view was that the meeting competition proviso could be invoked in circumstances such as confronted the respondent at 19th and Pearl Streets, Jacksonville.

The Commission's change in position is treated more fully in the brief amicus curiae filed herein by Texaco, Inc.

[20] The Commission's reading of the legislative history fails to differentiate the history respecting Section 2(a) from that relating to Section 2(b) (Brief, pp. 25-28). The history of the amendments reviewed by this Court in *Standard Oil* and *Staley* indicates that Congress, in adopting the Robinson-Patman amendments, had a purpose to *enlarge* the offenses previously described by the Clayton Act, by curbing not only sellers, as before, but also the predatory use of power by chain stores and large buyers. *Cf.* Federal Trade Commission, *Final Report On the Chain Store Investigation* (1934) p. 57 *et seq.* As this Court pointed out in *Standard Oil* (pp. 241-42), "none of these changes, however, cut into the actual core of the defense."

have had to search for its meaning in *Staley, Automatic Canteen,* and *Standard Oil.*

In further development of its "plain meaning" contention, the Commission argues (Brief, pp. 22-23) that the phrase "equally low price" in the Section 2(b) proviso would seem to import "identity between the discriminatory price and the competitive price * * *" Hence, the Commission concludes that this phrase would make sense only if the proviso were limited, as the Commission urges, to instances where "a seller's competitor offers his potential customer a low price," i.e. where Super Test should offer McLean a low price. This is so, the Commission urges, because "It is impossible to imagine a realistic situation in which there would be any legitimate economic advantage for a seller to sell to his buyer at a price equally low to that offered by the *buyer's* competitor (e.g. for a manufacturer to sell to a retailer at the same price being offered to consumers by the latter's retail competitor)." But the Commission's premise is not sound, and the conclusion does not follow. In the first place, in *Standard Oil* this Court did not construe "equally low" to mean identity of prices. The Court noted there that the company "sought to show that it succeeded in retaining these customers, although the tank-car price which it offered them *merely approached* or matched, and did not undercut, the lower prices offered them * * *" *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231, 238 (emphasis supplied). This Court held that proof of a discriminatory price concession not identical to the "equally low price of a competitor" was an absolute defense. If the position urged here by the Commission should be adopted, a seller's help to his customer

could be illegal if it did not discriminate enough, i.e., if it was less than enough to make for identity of prices. Such narrow literalness is not the "normal" and "customary" meaning of the words Congress used in the context in which they are found. In the second place, the question whether "equally low price" imports "identity between the discriminatory price and the competitive price" is totally unrelated to the conclusion sought to be drawn by the Commission. When, for the purposes of the meeting competition proviso, the competitive retail prices are compared, the problem suggested by the Commission disappears.

The Commission's enforcement of Section 2 of the Clayton Act discloses that the Commission itself has taken "equally low price" to have something other than a literal meaning. Thus, where one seller's products sells at a premium because of consumer acceptance of the brand, the Commission holds that equally low price means the maintenance, not of price identity, but of an established, prevailing price differential. If this differential is narrowed, or eliminated, then, in the view of the Commission, there is no meeting of the equally low price.[21]

The "plain meaning" argument asserts further (Brief, pp. 23-4) that it is necessary to torture the words of the proviso into an artificial meaning if Super Test's posted price for gasoline is to be taken as the equally low price met by Sun's price to McLean. Sun's

[12] *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 302 (1957), rev'd on other grounds, 289 F. 2d 835 (C.A. 7, 1961); *American Oil Co.*, F.T.C. Docket 8183 (June 27, 1962); *Corbey Products Co. v. Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 920-921 (S.D.N.Y. 1958). *Cf. Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 236 (C.A. 2, 1929), cert. denied 279 U.S. 858.

assistance to McLean was to enable him to post a price he selected to restore Sun's gasoline to a competitive position in which Sunoco gasoline would meet the competition of Super Test gasoline. The Commission's attack on this price assistance presents a problem of statutory construction in the light of all relevant facts, but the existence of the problem does not convert a vague statutory provision into one having a plain meaning.

No issue is before the Court in this case as to whether Sun's purpose was merely to meet, or to undercut, the price of Super Test. The court below reversed a Commission finding that the purpose was to undercut, and the Commission is not seeking review of that ruling (Brief p. 25, note 17). But it is argued by the petitioner, as a reason for its narrow reading of the proviso, that under the interpretation of the court below there would be no objective basis for deciding whether a seller's price to a retailer was merely to meet a competitor's retail price. The burden is on the respondent in a proceeding under the statute to establish the defense, including a good faith purpose to do no more than meet a competitor's price. If a respondent cannot present evidence sufficient to establish that such was the purpose and effect of a discriminatory price, he will fail. But because this is a matter to be proved is not to suggest, as the Commission claims, that Congress could not have intended the 2(b) defense to be available. If a supplier does no more than give defensive price assistance to its local dealer to enable that dealer to post a price that *he* determines, a price which is demonstrably no more than necessary to meet an existing lower price of a competitor, the element of meeting competition in good faith is clearly established.

II

The Choice of the Court Below Between Divergent Interpretations of the Proviso and the Court's Application of the Proviso to This Case Produce a Result in This Case Consistent With Law and the Economic Realities.

1. The petitioner's brief seems to be arguing a case against the petroleum industry. It treats the issue as one which requires solution of such problems as the liquidation of an alleged "oligopolistic" industrial structure and the finding of measures suitable to render harmless an alleged imbalance of relative economic power between suppliers and dealers. But the case made by the record involves only the respondent and a meeting of competition at 19th and Pearl Streets, Jacksonville. The respondent's position is that the proviso was properly interpreted by the court below for this case.[22]

The brief of the petitioner recognizes that the problem "is one of making difficult choices in an imperfect world" (p. 37). But it is not necessary to augment that difficulty by seeking a solution *here* and *now* for what the brief of petitioner describes as a "petroleum

[22] In *Bayer Printing Co. v. Local 731, Brotherhood of Painters*, 281 U.S. 462, 473, Mr. Justice Holmes said, for this Court that it does not "go into general propositions or prophetic statements of how it is likely to act upon possible or even probable issues that have not yet arisen". In *The Bradley Local No. 111 v. Wisconsin Employment Board*, 315 U.S. 740 the Court refused to go beyond the precise issue before it, holding (pp. 746-7): "We deal, however, not with theoretical disputes but with the concrete and specific issues raised by actual cases * * *". In *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395, the Court again emphasized its often stated practice in antitrust cases to let "[t]he varying circumstances of each case determine the result * * *." More recently, in *Federal Trade Commission v. Anheuser-Busch Co.*, 363 U.S. 536, 554, the Court commented that "our interest is solely with this case * * *" in construing and applying Section 2(a) of the Clayton Act.

industry characterized by retailer subservience to major refiners" and "oligopolistic price control and identity * * *" (p. 59). The oil industry is not on trial here notwithstanding the undocumented and imaginary sins attributed to it by the Commission's brief. Not only is the oil industry not party to this case, but the Commission's attempt at blanket condemnation flouts Section 2(b)'s focus on "individual competitive situations."

Lest any doubt exist on this score, the record here as well as common experience disprove veiled charges of predation. Gasoline prices reflect whatever the various sellers in the particular market have learned they can get without losing business to their competitors. A price reduction by one or more sellers, which is not followed by their competitors, will result in a loss of business to those sellers who did not lower their prices. For this reason, a seller's freedom over his own prices is circumscribed by the consumer's willingness to pay the price asked and his knowledge of prices available elsewhere.

Sometimes a seller finds himself in a so-called price war. He is forced to sell his gasoline at exceptionally low prices if he wishes to remain in business, for even in this abnormal situation market forces work with inexorable logic. As noted elsewhere herein, Judge Learned Hand said of the initiation of a price war that:

> "other competing stations must meet (price cuts) by a corresponding cut in order to keep up their sales; and that makes it important, if indeed not necessary, for the producing companies to reduce their prices to their own competing stations." *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F. 2d 457, 458 (C.A. 2, 1957).

Price wars do occur in the marketing of gasoline, but price wars are explainable by a variety of factors other than predation. There is not the slightest suggestion here that Sun's price reduction was even tinged with predatory motives. To be sure, the Commission's brief attacks the oil industry generally and hints that predatory pricing will go unchecked if the statute is not read the way it wants it to be read. That threat is not only unconfirmed in this record, but it overlooks the statute's requirement of good faith, which cannot be present if the price reduction is prompted by predatory motives rather than a meeting of competition.

The development of the issues here is not aided by arguments in the Commission's brief which depart from this case to argue one not made by the record. Thus the Commission asserts (Brief, p. 40) that a supplier like respondent should not be permitted to "cite the weakness of his dealers as a justification for engaging in selective price warfare. * * *" There is no evidence that in this case the respondent took any step which can be construed as an act of selective price warfare. On the contrary it is plain that Super Test inaugurated a selective price attack, against which respondent sought to defend McLean. Again, it is asserted (Brief, p. 49) that "Sun's purpose was to hold a state of truce with its major competitors while Super Test was being fought * * *". There is no evidence either that competition between Sun and its major competitors had become neutralized, or that Sun was fighting Super Test. The only evidence is that Sun was defending McLean, and itself, from Super Test's attack.

The argument of the Commission reaches out so far as to embrace mere suspicion as a justification for its

interpretation of the proviso. It asserts that "*the possibility* that a localized, discriminatory price cut was, at least to a significant extent, motivated by the purpose to eliminate competition" (emphasis supplied), is greatly increased by the interpretation which the Commission rejects; and then the Commission asserts that Sun's purpose in the instant case is "subject to grave suspicion" (Brief, pp. 44-5), far more so than if its price cut had been given to McLean because another supplier had offered McLean gasoline at a lower price. No evidence is cited to buttress a conclusion of "grave suspicion" or even of the "possibility" referred to in the Commission's brief. The interpretation of this statute for this case neither requires nor warrants resort to unfounded conjectures.

2. We have already reviewed the deficiencies in the two original suggestions of the Commission as to courses of action open to respondent, i.e. the elimination of its independent dealers by further integration in the form of direct marketing to the consuming public, and a rigid, anti-competitive, uneconomic general price reduction to all dealers, which would inevitably lead to price wars and reductions of their margins.

In its brief the Commission makes further suggestions. Thus, it is asserted (pp. 40-41) that a gasoline supplier, and presumably respondent, should refrain from exploiting its dealers and keeping them on the fringe of bankruptcy by providing them with larger margins of profit; then they would have strength to withstand "heated competition." This argument overlooks the fact that respondent functions in a highly competitive world; it does not itself have the power to set wider margins for dealers. McLean's low margin, at all times, price war or no price war, was the result of

the competition of other retail sellers. They determined McLean's price and the fact that his margin was not greater. If Sun should reduce its tankwagon price to make possible a wider margin for all of its dealers, it is not to be supposed that all of them would maintain their existing prices. Some dealers would inevitably seek to capitalize on reduced cost by seeking more sales at a lower price, general retail and wholesale price reductions in the market would soon follow, and the pre-existing margin would be restored. Larger margins could be inaugurated only theoretically, i.e., by a broad illegal conspiracy among all suppliers and retailers.

The threat of bankruptcy for a dealer subjected to a price raid like Super Test's, is the practical consequence of the remaining alternative open to respondent. That course would be to leave McLean to bear the entire brunt of the Super Test attack, to either let his profits disappear by refraining from meeting the Super Test price cut, or to meet the price cut out of his margin. That respondent did not abandon McLean to his own devices simply underlines the marketing reality to be that respondent and its dealers were unified in competing with Super Test for the motorist's business.

This conclusion is confirmed by the Commission's brief. It asserts (p. 39): "Nor was there any basis either in the record or in economic theory for the court's conclusion that a cut in Sun's tank-wagon price to fillingstation operators need cause a 'compression' in their margins * * *." In the first place, continues the Commission, there is nothing to require the dealers to lower their retail prices. But if Sun lowered a posted tank-wagon price, other suppliers would quickly match Sun's wholesale price, and very soon lower retail prices would be a reality in the area. Sun dealers would have

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should in any way go beyond this, it would not have the benefit of the defense. (2) In any event, if the presence of predatory pricing is demonstrable, the law and law enforcement agencies are available to put it down. An artificial, narrow, reality-ignoring construction of the proviso is not necessary.

The court below pointed out (R. 379) that the Commission's interpretation of the proviso tends to defeat a broad range of competitive and economic values which the Robinson-Patman Act and the antitrust laws seek to preserve. The arguments of the Commission attacking this conclusion (Brief, p. 45 *et seq.*) largely depend on the assertion that in fact McLean was not saved from elimination, and that a general price war in Jacksonville did in fact follow respondent's assistance to McLean.[23] This amounts to a claim that the construction of the proviso should be influenced by the success or failure of Sun's efforts. If McLean had been preserved in business, that fact would not weigh in favor of the interpretation of the court below. No more is McLean's business demise because Sun's help came too late, a guide to interpretation. As for the general price war in Jacksonville, we have shown *supra* (1) that there is no evidence that it was caused by Sun's help to McLean, and (2) that the court below attributed its inception not to Sun, but to Super Test.

The petitioner's critique of the decision of the court of appeals asserts that that court assumed that Sun

[23] The argument attempts to buttress its criticism of the conclusions of the court below by asserting that that court condones an "attack" by Sun on Super Test (Brief, pp. 49-50). We have pointed out *supra*, that Sun made no attack on Super Test, but merely defended itself from Super Test's attack. Here the Commission comes to recognize that what is involved is a competition between those two marketers.

was meeting an *unlawful* price of a competitor (Brief p. 55). There is no question before this Court as to whether the Super Test price was a lawful one for respondent to meet. There was never any contention below that respondent was attempting to meet an unlawful price, and neither the hearing examiner nor the Commission found the Super Test price to be unlawful for any reason. The opinion of the court below will be searched in vain for any conclusion or assumption that respondent was attempting to meet an unlawful price. This Court has recognized the lawfulness of a seller's selective price reduction in self-defense against "a price raid by a competitor." *Standard Oil Company v. Federal Trade Commission*, 340 U.S. at p. 248. That character of the competitive attack does not put competitors on notice that a sporadic lower price is or may be a full blown predatory pricing violation of some one of many provisions of the antitrust laws, or of Section 5 of the Federal Trade Commission Act. Sun was not told by the hearing examiner or by the Commission, in their respective decisions, to complain to the authorities, but rather to reduce its price to all dealers in response to Super Test's price cuts.

CONCLUSION

The construction of the proviso by the court below requires the Commission to look to the substance of Robinson-Patman Act prosecutions; the Commission would look only to surfaces and form. The application of the proviso to the facts of this case encounters competitive and economic realities in the marketing of gasoline. The court below gave effect to them; the Commission ignored them. The result of the decision of the court of appeals is not to create a right to inflict competitive injury; it carries out the purpose of Congress to protect the institution of competition by per-

mitting a supplier to protect itself and its outlet from a price raid. Finally, the decision of the court below makes it possible for small businessmen, singularly dependent on a source of supply, to be preserved as independent enterprisers instead of being eliminated by the integration of supply and distribution functions in their respective suppliers.

Price wars in the oil industry are complex economic phenomena which are not amenable to facile generalization or easy solution. The court of appeals upheld Sun's temporary price reduction to McLean in the context of the facts of *this case*. It is *this* holding, not the industry-wide conjectures advanced by the Commission's brief, which is the issue before this Court.

For the above-stated reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted.

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October, 1962.

APPENDIX

Section 2(a) and (b) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a) and (b), provides in part as follows:

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involve in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the

prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 56

FEDERAL TRADE COMMISSION, PETITIONER

v.

SUN OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

The briefs of the respondent Sun Oil Company and the *amici curiae* appearing in its support[1] concentrate their arguments not upon the statute but upon partially developed economic "realities" alleged to characterize petroleum distribution. These arguments invite the very kind of debate among competing economic theories that, as the Commission pointed out in its main brief, Congress sought to resolve by passing the Robinson-Patman Act. This reply is filed to point out that Sun has not made a record to support its primary claims (1) that the Commission's

[1] Briefs *amicus curiae* were filed by the National Jobbers Council, Inc. (herein "Jobber Br.") and Texaco, Inc. (herein "Texaco Br.").

Section 2(b) proviso renders the
to give price assistance to their
cannot give general area price
the peculiar circumstances of
the fact that it involves the pe-
all for special treatment under
hat to sustain the Commission's
nevitably lead to vertical inte-
leum industry. We submit that
supporting *amici curiae* have ad-
hy Sun and the other major oil
lly comply with the Act as con-
ission and in the same manner
er products comply with it.

ssion pointed out in its brief
among the alternatives open to
e competitive situation presented
give a general price cut to all of
ompetitive area—an alternative
r the Commission's construction
n and the *amici curiae* support-
ly that for various reasons, nota-
ossibility of defining "the com-
alternative is not as a practical
a major oil supplier. (Sun Br.
8–22; Texaco Br. 47–50). This
substance.

on the very circumstances in-
un ultimately made a determina-
etail competitive marketing area.
oted in its brief (Comm. Br. 10),
y or mid-February 1956, Sun

began to give the lower price it had been allowing McLean alone to "all * * * Sunoco stations in the Duval County area" (R. 90-91, 168; see R. 329, 357). That determination involved, insofar as equality of treatment of its dealers and compliance with Section 2(a) are concerned, the same factors as a determination of what such an area should have been when it granted McLean a discriminatory discount.[2]

Moreover, Sun's own announced policy of dealer location assumes a definable concept of "competitive area." Sun's vice president testified that Sun attempts "to develop the maximum coverage in any area . th the minimum number of service stations" (R. 215) and that "we have always tried to sell our dealers on the fact that they had an exclusive franchise and that no other [Sun] dealer would be in competition with them" (R. 216). Implicit in this policy is an assurance to each Sun dealer that Sun is able to determine the effective competitive area that he will occupy and that Sun will not itself destroy that area's normal boundaries by giving favored prices to other Sun dealers.

In view of this announced policy to avoid placing its dealers in competition with one another, it is especially noteworthy that—so far as this record

[2] Another instance in which Sun was able to define a competitive market for purposes of an area-wide price cut—and this time with salutary results—was involved in *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231. There, the trial examiner found that Sun had made a price allowance to its dealers "throughout the Detroit Metropolitan area" and had thereby brought about the virtual termination of a so-called "price war" (Record, No. 1, Oct. Term 1950, p. 5114).

shows—Sun made no effort to work out a legitimate area price reduction when, immediately after it had granted McLean a discriminatory price allowance, its non-favored dealers complained of the injury they were sustaining as a result (see Comm. Br. 10). Assuming that Sun initially may have thought its price reduction to McLean would have no effect on other Sun dealers, good-faith adherence to its dealer policy—not to mention the Robinson-Patman Act—would seem to have required that Sun at the very least adjust its view when the impact of its discrimination became apparent. Sun's failure even to attempt a general price reduction for the competitive area demonstrably affected discredits any plea of "impossibility."

Sun and its supporting *amici curiae* all seek to convey the notion that the Commission will automatically challenge any area price reduction as unlawful because of its impact upon those at the fringes of the area (Sun Br. 26; Jobber Br. 20–21; Texaco Br. 47–48). An authoritative Statement of Policy issued by the Commission some fourteen years ago (*Commission Policy Toward Geographic Pricing Practices*, 3 CCH Trade Reg. Serv. 10,175, 10,180 (9th ed. 1948)) provides the answer to such a charge:

> * * * there are strong reasons why the concept of injury adopted by the court in the *Morton Salt* case should not be applied automatically to discriminations arising under geographic pricing systems in which purchasers paying different prices are differently located and the price differences generally diminish as the distances diminish between purchasers' locations.

> In these circumstances competition between purchasers paying significantly different prices may occur in quite limited areas or only along the fringes of trade territories. Seeming advantages in price may be materially affected by disadvantages of location. These and other considerations make it clear that in geographical price discriminations inferences of injury to competition drawn merely from the existence of price differences between purchasers who compete in some degree would have no sound basis. The minimum determination of injury should be based upon ascertained facts that afford substantial probability that the discriminations, if continued, will result in injury to competition.

While this statement was issued in the context of basing-point systems, its applicability to area price differentials is obvious. Indeed, it was recently applied in that context by the hearing examiner in the *Pure Oil* case (cited at Jobber Br. 14-15[3] and referred to at Sun Br. 7, n. 3).[4] See Amended Initial Decision after Remand, p. 29 (Sept. 28, 1962), *Pure*

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[3] The Jobbers there assert, on the basis of the transcript in the *Pure Oil* case, that "the Hearing Examiner who wrote the Initial Decision and counsel who prosecuted the Commission's complaint in this case reject the Commission's construction of the proviso urged here." The quotations from the *Pure Oil* transcript on which this assertion is based have been taken out of context. The hearing examiner and counsel were referring to the fact that Pure Oil had made a nondiscriminatory price allowance to all its dealers in an appropriate marketing area, and the references to tank-wagon price in the quoted extracts were to the uniform tank-wagon price given to all Pure Oil dealers in that area, not to selected dealers as in this case. Transcript of Hearings, Sept. 21, 1962, pp. 4261, 4268.

Oil Co., FTC Docket No. 6640. There the examiner found no discrimination among dealers in violation of Section 2(a) where Pure Oil granted a reduced wholesale price to all its dealers in Jefferson County, Georgia (*id.* at pp. 29–31).[4]

That the Commission's Statement of Policy can be realistically applied to area price differentials in the petroleum industry was impressively demonstrated in recent hearings before a subcommittee of the House Select Committee on Small Business. There, representatives of Shell Oil Company and Richfield Oil Corporation testified that, in view of the Robinson-Patman Act, such "price assistance" as they give dealers is now offered to all their dealers in a competitive retail marketing area. Their testimony as to this practice emphasized essentially the same elements as the Commission's Statement of Policy. Thus Richfield stated that "retail prices appear to have traditionally followed certain geographical boundaries delineated by physical routes, such as highways, freeways, rivers, canals, bridges, and the boundaries of political subdivisions"; that such areas are "largely influenced by the nature of competition," are not "inflexible" and are "subject to change by changing conditions," but they possess "a degree of accuracy to enable its dealers to be competitive and to realize

[4] It is also interesting to note that the examiner there found—contrary to Sun's contention here that breaking an overall marketing area down into effective competitive areas is somehow too burdensome or impractical—that "Pure had more than 500 bulk stations throughout its 24-state area, each charging a different tank wagon price, except coincidentally." *Id.* at p. 22.

maximum profits" (Hearing before Subcommittee No. 5, Select Committee on Small Business, House of Representatives, pursuant to H. Res. 46, 87th Cong., 2d Sess., p. 107). Shell's statement of policy was summarized in the committee report as follows:

> in order to avoid a violation of the Robinson-Patman Act or the State antiprice discrimination laws, the company has established trade zones within which dealers are given uniform dealer aid assistance whether they request it or not and whether or not they lower their prices.

H. Rep. No. 2522, 87th Cong., 2d Sess., p. 7.

2. At the heart of Sun's (and its supporting *amici curiae's*) contentions is the theory that this case should, for one reason or another, be treated differently from others that fall within the plain terms of the Robinson-Patman Act. Thus, it is suggested that the character of McLean's competitor, Super Test, at whom Sun's price discrimination was aimed, somehow distinguishes this case from all others. By assuming that Super Test is a vertically integrated company (*i.e.*, that it is both supplier and retailer), the court below not only marshalled equitable support for its position but made it easier to regard Super Test and supplier Sun as "competitors." This assumption, which thoroughly dominates the lower court's opinion (R. 351–52, 355, 366, 370, 371, 373, 375, 376, 379, 380), is without any support in the record (see Comm. Br. 7, 51). Sun and its supporting *amici curiae* now seem to concede as much, contenting themselves with making the case turn on the fact that Super Test is a retail chain (see Sun Br. 1, 14,

15, 35; Texaco Br. 7; see also Jobber Br. 9–12). From this they still seek to draw equitable support for Sun's position, although this approach overlooks the comparative sizes of Sun (over 6,500 stations, see Comm. Br. 5, n. 3) and Super Test (65 stations, R. 319), which they envision as the "competitors."

We submit, however, that Section 2(b) cannot be read differently when the "competitor" is (1) an integrated company (as the court mistakenly assumed Super Test to be), (2) a large retail chain (which Super Test is not [3]), (3) a relatively small retail chain (which Super Test is) or (4) a sole unaffiliated independent and efficient cut-price dealer (as the "competitor" may be in the next case to come before the Commission). If the statute be construed as Sun contends, Sun could discriminate at will in favor of one of its dealers, even though the result would be serious injury to the other Sun dealers in the area and the total destruction of a one-man independent competitor of the favored dealer. Sun has not suggested any way—nor is there any way—of drawing a rational line between that case and this.

The court below sought to distinguish this case from all others on the theory that the competitive aggressiveness of McLean's competitor, Super Test, stemmed from predatory purpose rather than efficiency. Thus, the court observed, "This is not the case of an aggressive retailer such as a supermarket, having an established policy of doing a high volume

[3] The Jobbers' brief (p. 10) lists six other independent chains that are from three to twelve times as large as the Super Test chain.

business on a low margin, consistently emphasizing price over service" (R. 375). We have already noted the lack of record support for this assumption (Comm. Br. 55–56); indeed, the *amicus* brief of the Jobbers would seem to call for quite the opposite assumption. They describe the typical independent gasoline chain as "successfully adopting the chain-store merchandising philosophy of large volume and low price, combined with efficient service and large, clean and attractive facilities"; they point to the "keen competition" among refiners to supply these independent chains and conclude that they are "very effective competitors" (Jobber Br. 9).

The correlative suggestion in the opinion below that Super Test engaged in "predatory raids" (R. 375) or that it offered "predatory low prices" (R. 379) is also, as we have noted (Comm. Br. 55), without support in the record. Sun now seems to recognize as much (see Sun Br. 48); as, indeed, it would have to in view of its own witnesses' testimony as to the good-faith character of Super Test's pricing practices where, as here, it had just opened a new station. Thus, Sun's director of marketing research testified that in offering reduced prices Super Test had employed "the commonly used methods of more rapidly developing volume in new service stations that is used by such outlets" (R. 232). And Sun's vice president testified that an independent chain—unlike

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[6] Contrast the observation of the court below (R. 370) that "if gasoline suppliers competed with each other for the retail merchant's trade, the Commission's reading of Section 2(b) would be more realistic and more reasonable * * *."

a "major" (R. 280)—will often lower the price at a new station "in order to get that station off to a good start" and that this "is a practice that is rather well recognized in the industry" (R. 222). These errors in the assumptions on which the court below founded its decision merely underline the danger of attempting to decide cases under this generally applicable statute on the basis of the *ad hoc* construction employed by the lower court and urged by Sun and its supporting *amici curiae*.

The ultimate refinement of Sun's and its supporting *amici curiae*'s plea for an ad hoc construction of Section 2(b) is that the petroleum industry as a whole (or at least the "major" segment of it) requires special treatment under the Robinson-Patman Act (Sun Br. 9, 16–18, 21; Jobber Br. 3–4, 13, 16; Texaco Br. 6, 33–40). It is argued that a peculiar characteristic of this industry is that the "major" oil companies' "independent" retailers are so tied to and dependent upon their "major" suppliers that both supplier and retailer should be treated as one "competitive unit" for the purposes of the Act.

One thing that seems clear is that it was not inevitable for the "major" petroleum industry to have developed that peculiar characteristic. In the first place, it appears that independent retailers such as Super Test are *not* necessarily tied to their suppliers; thus there is "keen competition among all * * *

The court below put it thus: "Such dealers are something less than independent merchants and something more than the supplier's employees. They cannot try Sunoco one day and Esso the next; they are inextricably associated with the gasoline they sell" (R. 368, n. 27).

refiners [including the "major" oil companies] to supply the substantial segment of the gasoline market represented by these [independent] retail chains * * *" (Jobber Br. 9). In the second place, it appears that there has been at least some competition between "major" suppliers for outlets, including "winning existing wholesale distributors or retail dealers from other suppliers" (*United States* v. *Sun Oil Co.*, 176 F. Supp. 715, 720 (E.D. Pa.), quoted in Texaco Br. 35 n. 46). It also appears that the area of this competition for outlets may be contracting; while at the time of *Standard Oil Co* v. *Federal Trade Commission*, 340 U.S. 231, "major" refiners apparently engaged in continuing competition for the services of jobbers (see Texaco Br. 37), the Jobbers' brief indicates that even jobbers are now tied to individual refiners (Jobber Br. 5).

However, the fact that there is an ever-diminishing quantum of competition between "major" oil companies for retail and wholesale outlets—and hence that their "independent" dealers are not so independent after all—is no reason for excusing them from the operation of Section 2(a). It is the "majors'" distribution policies and practices, based on their own commercial interests, that have shaped the character of the industry in which they operate. They cannot, by so organizing and conducting themselves that compliance with Section 2(a) may present some difficult managerial problems, write an exception to that section for their own benefit. Congress intended that the prohibitions of the Robinson-Pat-

man Act should have broad and general application,[7] and it made no exceptions for the oil industry or any other industry.[8]

As the Commission pointed out in its brief (Comm. Br. 33–41), the lack of dealer independence on which Sun bases its plea for exclusion from the Act makes it all the more important to construe the Act so as to provide needed protection for these dealers—the very class of merchants for whose benefit the statute was enacted. Because it is assured of ultimate control of the retail outlets, Sun has less than the normal incentive that competitive sources of supply would create, to give all the dealers in the marketing area nondiscriminatory prices. Here, of all places, the salutary purpose of the Robinson-Patman Act—equality of treatment among dealers—should be enforced.

3. Sun and each of its supporting *amici curiae* warn that, if the Commission's interpretation of the Section 2(b) proviso is allowed to stand, the major oil companies will have no choice but to integrate vertically—*i.e.*, to take over the direct operation and control of their retail outlets (Sun Br. 29–30, 33, 49; Jobber Br. 2, 13; Texaco Br. 51–53). This warning is nothing more than an echo of the arguments advanced by the congressional opponents of the Robinson-Patman Act, one of whom, for example, urged that if manufacturers could not give discriminatory

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[7] See, *e.g.*, H. Rep. No. 2287, 74th Cong., 2d Sess., p. 4: "The granting of preferences is not confined to any one line of industry or distribution"; remarks of Sen. Logan, 80 Cong. Rec. 6257: "It applies to all industries." See also *id.*, at 6281.

[8] Attempts "to exclude particular commodities from it" were rejected by Congress. See 80 Cong. Rec. 6257, 6624.

discounts to large customers, then they would simply stop selling entirely to small customers, or set up their own distributing subsidiaries (80 Cong. Rec. 8124). See also *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 50, where it was suggested that table salt prices to carload purchasers would go up if price discrimination were not permitted. The Commission has amply demonstrated the improbability that there will be any wave of vertical integration in the oil industry if the Commission's interpretation is sustained (Comm. Br. 53–55).

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